UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-01139
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W. R. GRACE & CO., et al,	.	5490 USX Tower
	.	600 Grant Street
	.	Pittsburgh, PA 15219
Debtors.	.	
	.	January 21, 2005
. . . . .	.	9:00 a.m.

TRANSCRIPT OF AGENDA MATTERS
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: I just want you to know, we had all this equipment tested out last night and it worked fine. So, I don't know what happened between last night and this morning, but something obviously did.

This is the matter of W. R. Grace, Bankruptcy Number 01-1139. This is the time set for going over some objections to the disclosure statement.

I have participating by phone, David Pincus, Michael Davis, Ted Tacconelli, Tiffany Cobb, Michael Brown, Andrea D'Ambra, Debbie Felder, Sander Esserman, David Parsons, Mark Coleman, Jeff Carlisle, Frank Perch, Daniel Cohn, Katharine Mayer, Michael Lastowski, Lewis Kruger, Kenneth Pasquale, Denise Wildes, Elizabeth Magner, Dan Chandra, Natalie Ramsey, Mitch Sockett, Darrell Scott, Thomas Macauley, Francis Monaco, Leonard Goldberger, and Linda Carmichael.

I'll take entries of appearances in court. Please, if we can do it very quickly. Just stand and tell me your name -- that -- and who you represent. Don't give me law firm information. Your name and the party, period. Thank you. Good morning.

MR. BERNICK: I'll do my best, Your Honor. David Bernick, for the debtors.

MR. FREEDMAN: Theodore Freedman, for the debtors.

MR. KRUGER: Lewis Kruger and Ken Pasquale, for the Official Creditor's Committee.

MR. BENTLEY: Philip Bentley, for the Equity Committee.

MR. LOCKWOOD: Peter Lockwood, for the --

THE COURT: I'm sorry, just a second. I'm sorry. Okay, Mr. --

MR. LOCKWOOD: Peter Lockwood, for the ACC.

MS. ESKIN: Marla Eskin, for the ACC.

MR. BAENA: Scott Baena, for the Property Damage Committee.

THE COURT: Just a minute. Okay.

MR. SAKALO: Jay Sakalo, for the Property Damage Committee.

MR. WASSERSTEIN: Henry Wasserstein, Sealed Air Corporation.

THE COURT: Just a minute. Could you pick him up, Jan?

THE CLERK: Yes.

THE COURT: I'm sorry. Those of you in the back, I lied. You'll have to use the microphone. If you could just line up, please, and tell me if you're going to enter an appearance.

MR. FRANKEL: Roger Frankel and Rick Wyron, for the Future Claims Representative.

THE COURT: Good morning.

MR. WASSERSTEIN: Henry Wasserstein and Mark Chehi,

for Sealed Air Corporation.

MS. CARMICHAEL: Linda Carmichael, for Fireman's Fund.

MR. BROWN: Michael Brown, for Unigard and Commercial Union.

MR. PHILLIPS: Jack Phillips, for the Future Claims Representative.

MR. COHEN: Jacob Cohen, for Federal Insurance Company.

MS. WARREN: Mary Warren, for London Market Insurers.

MR. SCOTT: Good morning, Your Honor. Darrell Scott, Zonolite, claimants.

MR. WISLER: Good morning, Your Honor. Jeff Wisler, on behalf of Maryland Casualty and Zurich Insurance.

MR. LONGOSZ: Ed Longosz, on behalf of Maryland Casualty.

MR. PERNICONE: Carl Pernicone, Your Honor, for Royal Sun Alliance.

THE COURT: I'm sorry. What was your last name?

MR. PERNICONE: Pernicone.

MS. D'CHRISTOFARO: Elizabeth D'Christofaro (phonetic), for Continental Casualty.

MR. CRAIG: Andrew Craig, for Allstate Insurance Company.

MR. FISHMAN: Bob Fishman (phonetic), for Continental

Casualty.

THE COURT: Mr. Bernick?

MR. BERNICK: Yes, Your Honor.

(Pause)

THE COURT: Good morning.

MR. BERNICK: Good morning. Obviously there are a number of matters that have -- interrelationships here, and I thought what might be best, in order to proceed here smoothly, is to lay out what we believe to be a good road map for the issues that are now before the Court and point out their relationships.

And then, if it would be appropriate, I would be prepared -- in the sense -- go through our analysis of all of those issues. And I will begin with the plan confirmation issue that's been raised, which is impairment, but then bring in the estimation motion and some aspects -- only some aspects of the CMO. But, I'll speak my piece and then maybe we can proceed, sequentially, through the other constituencies.

I'm a little concerned that if we go issue by issue, or motion by motion, we're going to get -- end up talking about -- things and different parts of the briefing process, and this might make it a little bit easier. But I'm obviously at the Courts disposal.

THE COURT: Okay. Well, I think we should get through the question of impairment, because I believe that's an

issue, before the plan voting can go out, we need to address.

With respect to the case management order, until we get an approved disclosure statement, frankly, I think that's something that can wait. I think we need to see whether or not we can get an approved disclosure statement, and I don't know whether you're prepared today.

But, maybe it would be better to deal with the issues that are not yet resolved. I don't care about the issues that are resolved.

The debtor is obviously going to have to amend the disclosure statement. If they're resolved, you'll put them in the amended disclosure statement and if somebody objects I'll deal with them then.

MR. BERNICK: Right.

THE COURT: But, to the extent they're not resolved, maybe -- I can get some rulings and if we can get some rulings, maybe we can get to an amended disclosure statement.

MR. BERNICK: Okay. Well, let me do this, Your Honor. Let me make -- kind of put my little chart out. I'm -- obviously going to focus first and foremost on impairment. And then let me just layout how I think some of the other things that have been raised relate to impairment and then, in a sense, draw a line for what may not relate to impairment and just ask whether Your Honor wants to hear those things now, or later.

But, if -- maybe if I can chart it out so we see what it looks like --

THE COURT: All right.

MR. BERNICK: -- that would make sense.

If you take a look at the three issues that are addressed in our brief, relating to selected confirmation issues, obviously the most -- the clearest issue that's a plan confirmation issue is the impairment issue.

And in fact, the other -- there were three questions, I think, our brief addressed. One is whether there's impairment under the code, setting aside 524(g). The second question is whether 524(g) changes the analysis that would otherwise take place under the code. So, those are obviously both tied to impairment.

The third question relates to estimation. And both -- with respect to estimation and with respect to the CMO, there are aspects of the CMO and the estimation that, in broad terms, implicate impairment. And the others -- the other people -- people who have objected, saying that there is impairment, point to aspects of the estimation process that we proposed and they point to aspects of the CMO, in saying that there is impairment.

So, for example, with respect to the CMO, they say that personal injury claims in particular say, my gosh, you are consigning us to Federal litigation. Federal, then you,

litigation. That's an impairment of our rights.

Likewise, with respect to estimation, the position taken by both the property damage claimants and the personal injury claimants is that -- at least our brand of estimation, in particular, because we seek an aggregate number to be established -- maybe that creates impairment.

Even the channeling aspect of our plan is suggested by the futures claimant to create some kind of impairment.

So, what I thought I would do is address impairment, as a concept, deal with the issue of whether by calling for Federal litigation the contemplated CMO would create impairment, deal with the questions of whether estimation of aggregate liability would constitute impairment, deal with the question of the channeling injunction and whether it constitutes impairment.

I distinguish those issues from the other issues that have been raised -- and this is where Your Honor may wish to defer these issues, for now -- what I'll call the implementation, or execution issues.

And to be more specific, which respect to the personal injury claims, they object to the bar date, they object to the use of questionnaires, and they basically call for an estimation that's simply a settlement-based estimation. And because ours is not, they quarrel with that.

With respect to the traditional property damage

claimants, there's already been a bar date, there have already been questionnaires. The principal issue that they raged -- raise, is the issue of whether in fact estimation really can be done in the aggregate. Should it be an aggregate estimation or should it be claim by claim?

With respect to ZAI, we don't have a bar date yet, and the issue that's raised by the ZAI claimants is, why don't we get the science issue resolved first? What happened to that and why do we really need to have a bar date?

And, of course, our position is that we need a bar date so that we can move forward to making whatever determination Your Honor reaches with regard to the science, have it actually have impact on the bankruptcy process itself, including who are the claimants who are at issue, and what should happen with respect to their claims.

So, I'm happy to go through the impairment issue, but then take up these questions, as well. Also happy to go through the impairment issue and hold off on these questions, although I suspect that my brethren, when they stand to address the Court and talk about impairment, may disagree with how I've drawn this line. And they may regard some of these implementation issues as impairment issues. So, that's why I've laid it all out.

I can -- I could, either way, and whatever Your Honor believes is appropriate, I'm prepared to proceed in that

fashion.

THE COURT: Well, let's start with the legal issue, with respect to the classification of impairment, before we get to the implementation side --

MR. BERNICK: Okay.

THE COURT: -- and start in that fashion.

MR. BERNICK: Okay. The procedural posture of that issue, I think, is fairly straight forward. We bear the burden of demonstrating that there is no impairment. I think that that's relatively clear.

And yet, at the same time, it is also clear that because of the stage that we're at in this process, which is the disclosure statement hearing, the only issue before the Court is whether there is -- whether impairment constitutes a -- creates a patently unconfirmable plan, or a facially unconfirmable plan. So, the standard of proof here is not the same as it would be in the context of the confirmation hearing itself.

Now, that's not to say that it is, by virtue of that, an easy task, that is, because of the posture of the issue today. But, I believe it is in fact an easy task to demonstrate that impairment does not constitute that kind of issue today, for two reasons.

One, is that we all know that in this business almost nothing is patently obvious and almost nothing is facial.

There are always wrinkles and this is a complicated area and that, in and of itself, would caution against the idea of saying, gee, we now know, today, that in fact there is impairment, and it's quite clear, and therefore this plan should not go forward.

But, the other reason why I believe it's going to be easy for the debtors to satisfy their burden in this respect, is that in this case, on this issue, before this Court, at this time, God bless, I've got clear Third Circuit authority that supports my position. We don't have to create any new law. And that, obviously, is the PPI Industries case.

Now let me put the Third Circuit's ruling in that case a little bit in context. The code does create exceptions, where if you meet with the exception -- meet the exception, you can demonstrate non-impairment. And the one that most frequently is discussed is 1124(1), which basically requires that the plan leave "unaltered" the legal, equitable, and contractual rights of the creditor or claimant.

And it would seem, on the face of it, that that's a hair-trigger test. It's extremely difficult to craft a provision or plan that, in some fashion, doesn't alter or affect those rights.

In the sense, the driving concept we see, that that language seems to implicate and that, in fact, is advocated very strongly, is that essentially anything that you do that

has any kind of impact whatsoever, on those rights, constitutes impairment.

The law, however, I think, has become much more sophisticated than that. If you go back to the list of what we're talking about, which are these rights, legal, contractual, equitable rights, those rights are defined by the law.

And the simple answer to all of the contentions that have been made regarding impairment, is that they grossly overstate what legal rights really are.

All legal rights carry with them a series of very complex and important constraints. There's no such thing as an absolute legal right. So, when you read the word rights, be they legal, equitable, contractual rights, all of those rights have inherent in them limitations.

And the limitations on those rights cannot constitute impairment. The concept is really that simple. Those limitations that are implicit or explicit in those rights vary in significance depending upon where the claim stands, what its status is, in the bankruptcy process.

And I tried to think of a simple way to illustrate this and maybe it's too simple, but I'll try it anyhow.

This is intended not to be a target with a bull's-eye on it -- although I know that my objectors will feel that way -- but it's designed to create a spectrum.

In the center, we have allowable claims. And clearly, with respect to allowable claims, which is a very conscribed term, the ability to limit those claims is very, very much -- is very, very narrow.

You have to provide for -- you can't provide for payment -- you can't pay them less than what they are and you have to provide for their payment. You can't simply say, well, they're out there and they'll get -- they'll get paid at some point. You have to provide for the payment of those claims, otherwise you have an impairment problem. But, those are allowable claims.

Very different -- in the broadest circle, are claims. Claims are very broadly defined. And where you have claims that are asserted claims, but they're unliquidated and they're disputed, limitations on those claims do not give rise to impairment, provided that those limitations emanate from the law -- from the legal process itself.

And this was made very clear in the decision that was reached in the American Solar King Corp. case, where the Court pointed out, in the following language, and adopted the -- or the word called impairment by statute.

The Court pointed out, in this language, the following. I'll see if I can zero in on it.

The mere filing of bankruptcy does not operate as impairment, under Section 1124, which speaks in terms of the

legal rights of a claim, itself a term of art referring to the call on estate assets that a creditor or interest voter holds as of the date of the filing. And there's a cite. It is the Bankruptcy Code itself which creates the concept of claims, according broader legal rights in some ways and restricting legal rights in other ways.

And it was in this decision that used that -- that really drove that distinction and labeled the latter -- that was the limitations of the code, impairment by statute. The concept being that the claim itself is highly constrained. There are many different limitations, all of which are imposed by law, none of which are -- constitute impairment.

This language, and this approach, was adopted by the circuit in -- the Third Circuit, in the PPI Industries case, where Solow, who was the plaintiff in the case -- the world's a small world. I litigated a case against Mr. Solow in State Court in Manhattan many years ago and in fact, this actually emanated from a different part of that case, that you're not involved in. But, Solow took the position that impairment really had to be judged against the touchstone of whether it affected the claim.

And in fact, the Third Circuit, in the opinion, pointed this out saying Solow contends a broad definition of claim requires a finding of impairment, whether the source of impairment is the plan or the statute. Essentially, he took on

the question of whether Solar King ought to be the law.

The Third Circuit, as the discussion in PPI then goes on to point out, adopts the reasoning of the Solar King case, adopts the distinction of impairment by plan versus impairment by statute, and makes the following observation.

Generally, we agree with the Solar King analysis. The relevant impairment language requires bankruptcy plans to leave unaltered, et cetera, et cetera.

In other words it concludes, a creditor's claim, outside of bankruptcy, is not the relevant barometer for impairment. We must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights.

The entire legal process is part of the right. It is a constraint on that right. The claim is not the touchstone. The claim is simply the beginning of the process.

Again and again, in the papers, the objectors here fail to recognize this fundamental point and they again, and again, advocate that -- the position that the touchstone should be, well, what would happen in the tort system? What would happen to claims in the tort system, as they were being dealt with pre-bankruptcy?

That's the wrong measure. That's the measure that was expressly rejected in the PPI case.

This is an example from the personal injury

claimants' brief, at Page 14, where they insist, after talking about some other alteration, they insist, were it not for Grace's bankruptcy asbestos claimants would have the legal right to litigate their claims against Grace in the courts of the State where they reside or which their claims arose.

Nothing to do with impairment. That is just not relevant for impairment purposes. The Third Circuit already has squarely resolved that issue.

So, what is it then that -- how else do we then fill in this chart? What are the limitations that are imposed upon claims in the process by which claims are then reduced to allowable claims?

Well, first of all you have a legal process called allowance. To put claims through a process, or allowance or disallowance, is not impairment. It is what the code calls for. It is a legal constraint. And the -- some of the objectors own citations reveal this.

In re Geraldine Becker Smith made it quite clear that impairment only was a doctrine that applied after the conclusion of the legal process, or allowance or disallowance. Having to go through that process was not impairment.

So, where does this kind of approach leave us? It says, once you have legal process you're partway down, but there are further limitations. For example, there are substantive bankruptcy limits.

That is to say, as the Court in Solar King recognized, that a claim, before it gets to bankruptcy, if it is -- which we'll talk about in a minute -- has legal constraints. But, once it gets into bankruptcy, even beyond the process of bankruptcy, there are substantive limitations. Caps, for example, on recovery and the like, those also are limitations that limit the claim, limit the right, that do not constitute impairment.

And, finally, you have State and Federal substantive law. What are the defenses for the claim? So, so long as in a plan -- or in a plan, all of the constraints or limitations are driven by the law, that is they're what the law requires by way of legal process, substantive bankruptcy limitations, or substantive law determinations that are applicable to those claims, none of that's impairment.

It is only with respect to claims that clear that process, and clear the bankruptcy and substantive law limitations and become allowable claims, that we really have the benchmark and litmus test for whether there is impairment.

Now, we get back then to the three things that I have up here. We have a CMO that calls for Federal litigation. We call for a channeling injunction, under 524(g), to a trust. And we then have an estimation process that's designed to determine an aggregate amount of liability.

Where do all those fall? They all fall as part of

legally driven and required processes. Estimation is such a process, under 502(c). Litigation is such a process, and there are rules that we'll talk about that apply to the litigation -- the litigation process for claims allowance and disallowance. And, obviously, channeling is a feature that's called out by 524(g) itself.

So, all of these processes are completely within the realm of statutorily driven limitations that do not constitute impairment.

What about the particulars, for example, estimation of aggregate liability. Is that something where, in the sense, we have deviated from what the code requires? Does the code allow for estimation of the aggregate? And it clearly does. 502(c) calls out for estimation, specifically, as an alternative to litigation.

And, repeatedly, it's been recognized that the Court has the power, under 502(c), to aggregate -- to estimate liabilities in the aggregate.

That was recognized in the Manville case, it was recognized in the UNR decision, and there's a very extensive discussion of exactly that process, by the Fourth Circuit, in the A. H. Robins case. And I would urge the Court to take a look at the discussion there, because it's probably the most detailed discussion.

What about Federal litigation? There is no

entitlement to a State Court venue. In fact State Court venue is specifically precluded under the code. 5 -- 157(b)(5) specifically calls out and says that the litigation of claims, including to a Jury, would take place in Federal District Court.

The limitation to Federal -- to a Federal venue, again has been repeatedly recognized. It's recognized in UNR, it was recognized in Manville, it was recognized in the Dow Corning case.

And, obviously, the channeling injunction is something that we don't have to spend very much time on. It's specifically called out in 524(g).

So, at the end of the day, we have scrupulously deployed, in this particular plan, devices and processes that are specifically code driven and are recognized in the case law as being code driven.

And, as a consequence, all of these fall on the right side of the PPI decision. Third Circuit law is absolutely clear that none of these constitute impairment. They're not a question of a plan provision. They're a question of what the law requires.

The insistence that's being made by the objectors here, that says, they are still impaired, they are entitled to vote against, therefore becomes very apparent, in terms of its implications.

They're not looking for a preservation of their rights. They're looking for an enhancement of their rights. They're saying, we're entitled to vote, even though all of the different processes which you say are appropriate to apply to our claims come from the law, we're still able to vote against this plan, because we don't like those procedures. We don't want to be constrained by those procedures. We'd rather go back to the State Courts.

Well, that is an enhancement of their rights and the effect of it is quite obvious, which is that if they don't like the way that the law is being applied, they say, we're going to vote against. We don't want to be limited by the law. We'd rather have something else.

That is just a nonstarter. It certainly is not something that is patently obvious, or facially obvious from the cases and the decisions. To the contrary.

And, therefore, they cannot begin to meet the test for opposing the plan, at this stage, on the grounds that it's facially deficient.

What about 524(g)? Does 524(g) change any of this? We think it's quite clear that it does not. 524(g) increased the voting requirement to 75 percent. That's a numerical change. It didn't change anything about what constitutes a vote, who's entitled to vote, or impairment.

It calls for a channeling injunction. That didn't

change anything.

There's nothing in 524(g), at all, that speaks to the question of who is entitled to vote or what's impairment. And that's not different from any other aspects of 524(g). 524(g) is not a stand-alone provision of the code. It is parasitic on the rest of the code and it's dependant on the rest of the code, when it comes to a whole series of different issues, it depends on the rest of the code.

For example, estimation. Estimation is called for, basically, under -- it's required, really, in order to execute 524(g). But, the provision relating to estimation was -- it's a different part of the code, and the case law is under 502(c), before 524(g) ever was passed.

So, what they're arguing for when they say -- and somehow 524(g) changes the analysis -- is they're saying, there's something about 524(g) that even though it doesn't call out for any different set of rules, requires that there be a different set of rules.

I'm sorry. You can't find that in the statute, you can't find that in the legislative history, you can't find that anywhere.

And what's the consequence? Well, the consequence would be, if they're right, that now that we're in 524(g) land, all of the protections and all of the limitations, which are inherent in their rights and in their claims, as a matter of

law, get thrown out the window.

But, because we're in 524(g) land and they say that the typical rules of impairment do not apply, you can agree to pay claimants hundred cent dollars, or you can require that claimants go through a process of claim's allowance and disallowance, or estimation, as they -- well, that may be the law elsewhere, but we're in 524(g) land. We don't like that kind of stuff. We're going to vote against the plan. And if you don't have our vote, guess what, you're not going to have a plan.

524(g) was not designed to put claimants in the position of unilaterally determining what the law was going to provide as to their claims. 524(g) sits within a broad network of code provisions, all of which are critical to the execution of the purpose of 524(g).

Otherwise, 524(g) would simply be a process of claimants kind of sitting back and saying, well, you're kind of getting there. We're almost high enough. We're not quite there. Or, gee, you know, I know my clients aren't really terrific, but I don't want to put them through a claim's allowance process because, you know what, if you make me do that, I'm not going to vote in favor of the plan.

So, from our point of view, Your Honor, the impairment issue is not -- is, in a sense, simple. It's simple though, in a fundamentally different way from the way that it's

cast by the objectors. The objectors make it a hypersensitive test. And to a certain extent, and certain context, it can be.

But, impairment is not a reason why these claimants, all of whom have got disputed, unliquidated claims, don't have to abide by both the substantive and procedural law that would otherwise govern whether their claims should be paid.

So, Your Honor, that's -- those are my remarks concerning impairment. I'm happy to go through -- I think it would probably take me another half-hour to cover the rest, but I'm really at the Court's pleasure.

THE COURT: Well, why don't you finish, and then I'll just hear from whoever wants to oppose the legal argument on impairment.

But, I would like to get all of that done before the lunch hour. I want to get to the disclosure statement issues today. So --

MR. BERNICK: Okay.

THE COURT: -- I hope to run through it.

And I want everybody out of here, in time to get home. We're supposed to get -- be getting very nasty storms, so expectation is, by 3:00 or 3:30 today, so that all of you can make your flights, we're going to be finished. I realize we won't get done. We'll adjourn this to another date, but that's going to be it for today. So.

MR. BERNICK: I think that you probably will have

unanimous support --

(Laughter)

MR. BERNICK: -- in that, here, Your Honor.

THE COURT: No, no.

MR. BERNICK: Let's talk a little bit about the implementation issues. And the implementation issues are, in a sense I guess, a little bit more into the guts of the case.

This is a nice change. I spend most of my time these days in the Federal Courthouse in Washington where they still -- the GSA still hasn't figured out how to put in controls like that.

THE COURT: Well, yes. They're not -- yes. It's just another one of those government things.

MR. BERNICK: Personal injury claimants, on estimation, agree that we need estimation. In fact, everybody in the case agrees that we need to have an estimation, but they only want to do that estimation their own way, which is a process of extrapolation.

And Your Honor, I think, is probably familiar with the basic dynamics of it. It's really all in one curve, which is they take a look -- if this is today, or the filing date, they take a look at the claim settlement history -- what's been the flow and cost of claims. They take a piece of that, say three or four years. They say that during this period of time, in relationship to the total number of disease -- the total

disease incidence, or prevalence, over that period of time -- take Mesothelioma.

If Mesothelioma claims, in the last three or four years, represented 25 percent of total Mesothelioma claims, then let's assume that that will be true forever, so they then extrapolate this curve. And by Mesothelioma claims, they mean any claim that's been settled, whether or not it was shown to be a valid claim in Court.

And that effect of this, of course, is that you have -- the past history becomes dispositive of the future and you get these enormous numbers, all predicated on extrapolation from settlements.

And obviously this perpetuates -- this serves to perpetuate the pre-bankruptcy tort system. The pre-bankruptcy tort system become dispositive of actual liability estimates. There's many, many problems with that, from a Prudential point of view.

We all know today -- everybody knows, even the plaintiffs' bar recognizes today, that that tort system is broken. Their own experts have written letters saying that bogus claims are presented on a routine basis, that all kinds of people are getting paid who should not be paid, because they're not sick.

Everybody in the world knows it, yet we're sitting here in this Court, and they're still going to stand up and

tell you, yes, that's the way it should be and that should be dispositive here in bankruptcy.

Well, if it's dispositive in bankruptcy, why does anyone file for bankruptcy? If all that's going to happen is that we're going to have the same tort system, that's messed up, be used to actually define what the liability is, why go into bankruptcy at all. And of course, the answers, somewhat cynically, will come from the personal injury bar, well, the real purpose of bankruptcy is simply to have you pay out all that you've got.

Well, bankruptcy means much more than that. What is that that it means? Well, the bankruptcy process does not require that approach. Indeed, it actually precludes this approach.

And the -- the only reason that this is at all controversial is that there are so many cases where this extrapolation methodology has been used, on a consensual basis, where it's not been contested.

The counsel will stand up and talk about all these different cases in which this has been used, why should we be different? And the answer is, because the law has not actually been litigated in those prior cases, on this issue.

And it's been very difficult, as I know Your Honor appreciates -- it's been very difficult to get these issues framed and resolved, and that's best evidenced in this case.

Because, in this case, the debtors have diligently, ever since the beginning of the case, sought to get these matters actually resolved.

What does the Third Circuit law say on this matter? The Third Circuit law, again, is clear. We have the Bitner v. Warren Chemical case, where the Court talked about the latitude that exists for how estimations should be conducted. But, it was presented with a situation where the Bankruptcy Court actually did an estimation on the merits. It didn't simply say, well, what's the probability of success? Didn't simply say, what's the statistical analysis? I want to know what the merits are.

And there's actually a long line of cases that -- that's exactly what estimation is supposed to be. It's supposed to be a merit's consideration. You may have a streamlined process, but it's supposed to be merit's oriented.

And the Bankruptcy Court came out with a zero estimate for a claim, shocking as that might seem, based upon the merits. And the Court of Appeals -- the Circuit said, in very clear terms, yes, there's a lot of latitude.

But, one thing is quite clear, and it is emphasized by the Court, and I have written it down -- I've underlined it. In so doing, that is in doing the estimate, by the Bankruptcy Judge, the Court is bound by the legal rules which may govern the ultimate value of the claim.

So, in determining how to do an estimate, you have to follow the legal rules. The issue then becomes pretty simple. Do you do an -- does a settlement driven estimation comply with the legal rules?

And this is not something that requires parsing a lot of case law. All you've got to do is read the rules and they are crystal clear. What the rules say is that you go through a process for determining liability.

First, you acquire jurisdiction over the claimants for a notice and bar date process. You then join issue for -- with objections. And once there is an objection, once issue has been joined, the matter becomes a contested matter. And the Bankruptcy Rules specifically call out what rules apply in the event of a contested matter.

And guess what? The Federal Rules of Evidence control all issues that are raised in a contested matter. We are -- Federal Rule of Evidence. What does the Federal Rules of Evidence say about settlement evidence? It doesn't come in. It's just not part of the equation.

What about the Civil Rules of Procedure? Certain Civil Rules also are incorporated.

So, you've got a standard of liability that is State or Federal substantive law, but you have the rules of evidence, you have the rules of procedure, specifically identified rules. Those govern whether you do an estimate or whether you do

litigation, for purposes of liquidating the claims.

Who's the trier of fact? Obviously, in an estimation it is the Court. In the case of litigation it can be a Jury. In the case of personal injury claims, it must be a Jury.

How does the plaintiff -- how do the objector's extrapolation methodologies fair under the standard? They don't follow any of those rules. Not a single one of those rules. It's kind of free-form estimation. This is what we would like to do. And it should be done, because, you know what, a lot of other Courts have done it, even though those other Courts haven't had to confront the law.

What's the net effect? Extrapolation, their approach, abrogates all liability standards, abrogates the Federal Evidence Rules, ignores our Jury trial right, there is no Jury trial, and it's not -- it's not a 502(c) estimation at all.

In the starkness of this contrast between what it is that's actually required, in order to follow the rules that are established under the code, and in their approach, is best illustrated through, just -- I'll give you only a couple excerpts.

We did this -- we litigated this issue, in part, in the Babcock case. And their expert in the Babcock case, that is the claimant's expert, was Mark Peterson. Mark Peterson has done these estimates in all kinds of cases.

And to show how dramatic the contrast is between Dr. Petersons's world and the world of settlement extrapolations on the one hand, and what ordinarily would be the rules of liability on the other, I just got a couple quotes. I said,

"Q Let's talk about dose. I've looked through your expert report, and nowhere do I see you have determined the dose of asbestos exposure that any of these claimants have from Babcock and Wilcox asbestos. Isn't that true, it's nowhere in your report?

"A No. It's nowhere in my report.

"Q Well, what about -- does anyone -- have you determined whether anyone actually got sick from Babcock and Wilcox asbestos -- not just asbestos, but Babcock? Have you done that? Can you tell us how many people? Is it true that you have nowhere determined whether and how much malignant disease was actually caused by exposure to Babcock and Wilcox products?

"A No. I've not determined that."

Plain as day. Now, when it got time for trial, Dr. Peterson was a little bit -- a little bit less cooperative.

"Q Let me make it clear, isn't it true that you've nowhere determined whether and how much malignant disease was actually caused by exposure to --"

He didn't say, no, I have not, he says,

"A No one can determine that. Only God knows that.

Okay. 'And then he says,' no.

"Q You've not determined that Babcock and Wilcox caused any of that Mesothelioma?

"A I've not been -- I've been unable to determine, on a case by case basis, which -- whose asbestos cause it. No one can do that."

Well, originally is was God. Now, it's no one. But, that's what we have Juries for. So, it's not God, it's not -- only a Jury can figure out the answer to that question. He certainly has not done that.

And I then got him to admit what he admitted in his deposition. Polls apart.

Liability rules require that a defendant be implicated, that there be a causal connection, that there's actually liability. Legal liability is not part of this equation, at all. It is squarely contrary to the rules.

We have called for an estimation that complies 100 percent with the rules. What is that estimation process, if you follow the rules? First, we've got to bring the claimants before the Court and we bring them before the Court through a bar date.

They oppose a bar date. They say you don't need a bar date, but that's the only way that you can acquire jurisdiction over individual claimants for purposes of analyzing the merits of claims. If you don't have merits of

claims before the Court, you're not going to make very much progress in an estimate.

The importance of establishing a bar date, for estimation purposes, was specifically recognized in the Eagle-Picher case, and much more recently in the Babcock and Wilcox case, by Judge Vance. So, we need a bar date.

Number two, we have to fill out questionnaires, just as was done in the case of the property damage claimants. Questionnaires are justifiable in two different ways.

Number one, they can be justified as part of the claims allowance and disallowance process. This was the justification that was used by the Court in the A. H. Robins case. In A. H. Robins people, first of all had to say, in response to a notice, that yes, they were claimants.

They then were given a followup questionnaire to fill out. And the objection was made, well, why should we have to fill out a questionnaire? And the Court said, this is a question of establishing what the basis of liability is and that's a requirement for a claim. It has to set out a basis of liability. A questionnaire is the right way to go.

We could do exactly the same thing. We could do what we did in the case of the property damage claimants. We can say, you've got to file a claim form by the bar date. Totally justifiable. But, is it justifiable for an additional reason, which is it's part of the discovery process? It's an efficient

way to conduct discovery.

If you talk about the personal injury claimants, in particular, we have conscribed what we're asking for be a bar date, with respect to those people who already had pre-petition litigation, so they're represented by counsel, they presumably have information to establish the basis of their claim.

And we've gone one step further than what -- where we were with the property damage claimant. Instead of making them fill out that questionnaire by the time of the bar date, we have a much simpler form to use in making the claim. We then, if they -- so that there's no burden associated with meeting that bar date.

We then say, okay, now fill out the questionnaire, because you've said that you want to be part of this case. It's a very conservative approach. It's a very -- it's sensitive to the issue of whether people are being overly burdened at the time that they say that they want to be part of this process.

So, we have a bar date, we have a questionnaire process, and then we identify common issues and what their impact is, in order to define a smaller population of people who may have sustainable claims.

Now, that all sounds very abstract, but in point of fact it's already been done in the Babcock case, which is actually a fairly good example.

In the Babcock case there was a claim form that was used. We gathered all the data, and we mustered that data to show the Court what kinds of claims were being filed.

And just to give you an example, people had claims for asbestosis in that case, they filed, and we had 18% of people who said that they were claimants didn't have a score at all. Fifty-one percent had an ILO score of less than 1 -- 1/0 or less, which is a borderline score. Only a very small portion had ILO scores that were 1/1 or above.

Interestingly, ILO scores, under the procedures themselves, ILO procedures, have to be read independently and they have to be replicated. None of that was done with respect -- as we saw it, with respect to any of these different proofs of claim.

But, the issues that we were able to isolate were not confined -- were not confined to ILO scores and medical results. We were able to establish a predicate for a whole series of liability defenses.

So, we basically took over 200,000 claims and were able to demonstrate the different strata of those claims, that were sorted out either by medical data or by facts that drove liability determinations.

If you take a look at the Grace case, we think that the Grace case is going to be similarly amenable to exactly the same kind of process.

In Grace, Your Honor is familiar that personal injury claims were on the decline, and all of a sudden, in the year 2000, not as a function of any scientific principle, any disease process, anything other than the fact that somebody decided to make Grace an even more prominent target, the claims skyrocketed.

We actually did a little bit of sampling, with respect to these claims and we now know that with respect to the claims, overwhelmingly, they're claims of people who do not have any malignant disease.

With respect to the diagnostic test results of the people who are claiming non-malignant disease, even a tiny, tiny fraction that have -- been demonstrated to have ILO scores of 1/1 or above, or PFT's meeting the AMA mild impairment standards.

Now, we're not going to rely on the AMA standards in connection with this case. We don't have to. The point of this is to establish that an overwhelming number of the claimants against W. R. Grace, in this case, are exactly the kinds of claimants where people have now testified before Congress, on behalf of the plaintiffs' bar, that the claims are junk claims. They're bogus claims.

One of our major tasks in this case is to sort out those claims using the claim form process. But, it's not confined to that problem either.

In order to get that enormous spike, we not only got all of these non-malignant claims, we got claims from people in all kinds of industries. Grace's asbestos was used in the construction industry, but look at all these other industries that are represented by the sampling of claims that we looked at. The railroad industry, auto maintenance, tire and rubber manufacturing. What is the connection? There is no connection.

So the process that we want to follow here is a basic process that's called out in the code, it's been used before, it's highly efficient, and we believe we can get to an aggregate estimate promptly.

One other point that I -- a couple points that I want to take up that have been raised in the briefs, and are simply erroneous.

The claim is made, there's no process for collective determination of individual cases that is consistent with constitutional and statutory standards of due process, citing Cimino. That is a total red herring.

What we have done here, first of all, we're doing an estimate. Cimino was not an estimate case. Cimino, therefore, had to protect the individual rights of each person, for purposes of liquidating their claims. In estimation we're looking for an aggregate value. That's not what we have to do.

In connection with the CMO, we also have to call for

common issue litigation, but that common issue litigation, which was done in Cimino, does not involve extrapolation. The common issue litigation simply aggregates all the claims that are pending, looks for a common issue between them, and does absolutely no extrapolation.

The futures representative says, well, you can't estimate the demands. We're not seeking to estimate the demands. What we're seeking to do is to estimate the future flow of claims. And that is part and parcel of 524(g).

524(g) specifically was designed to create a future -- a trust for benefit of futures. And, obviously, you have to do an estimate in order to figure out how to fund that trust.

The futures representative says, well, gee, under 524(g) you're not going to have an aggregate estimate because it requires that the actual number be indeterminate, or the claim -- what is it -- the language be -- actual amount, numbers, and timing of future claims cannot be determined.

They can't be determined in a fashion that is dispositive with respect to each individual claim, but they have to be determined for purposes of figuring out how to fund the trust. Otherwise, you can't assure the futures are going to be paid at all.

And then, finally, the futures claimants say, well, in State Court tort actions you would not be able to seek summary judgment on such factually -- State tort litigation is

irrelevant to this process. What you're doing is you're estimating what the liability will be. The liability for PI claims will be determined in Federal Court, not in the State Court. That, again, completely misses the issue.

In the interests of time, Your Honor, I want to move on to talk about the traditional property claims, and the ZAI claims. But, the bottom line, with respect to the personal injury claims, is we're doing it exactly as the code requires and the only answer is, gee, we don't want to abide by what the code requires.

With respect to the traditional property claims, Your Honor obviously is very familiar with those, but I want to put them also into a little bit of historical perspective.

Recall, Your Honor, that before this case was filed, dating back to 1990, the whole phenomenon of property damage claims against W. R. Grace was all but a thing of the past. You can see what the trend is. You've got a vanishingly small number of cases being filed by the time this filing took place. The trend line is unequivocal.

We then said, well, gee, you've got to have -- we have to be definite here. Let's find out who else is out there. And all of a sudden, out of nowhere, comes no less than 4,200 claims. Well, for some reason, that's not what the trend was. And obviously, that would indicate that we have a real problem that we've got to sort out.

We urged that the Court require the special claim forms to be filled out. They were. And we now know what the source of the problem is. We've analyzed the claim forms and this again is proof of the pudding that the claim form process works. We've taken each claim form, which had those set questions, and we've analyzed them to look for particular key facts and key issues.

Has the statute of repose expired -- which can be ascertained from a very small number of facts? Has the statute of limitations expired? You don't need to know an awful lot to do that. Constructive notice will do the job. When did these folks know that they had Grace asbestos in their building? Was it at a point in time when people were on constructive notice that asbestos created potential problems? Very easy to ascertain from the forms.

As an example, we have -- with respect to a couple claim forms here, we have the following question. This is a claim form that was filled out by -- for CBS Broadcasting.

"Q When did you first know of the presence of asbestos in the property of the Grace product for which you are making this claim?

"A 1988."

Well, was there constructive notices of 1988? The Prudential decision, which went through basic facts that are going to be the same in all of the cases, decided that

constructive notice arose with respect to property owners and asbestos in 1983.

So, we take -- we'll take the history of what was known about asbestos, with respect to property owners, that's unitary. That's the same. We go to this claim and say, Your Honor, constructive notice is 1983. We go to this claim form, 1988. Well, the statute of limitations was triggered by 1988, when did they file their claim? It's long barred by the statute of limitations.

"Q When did you first learn that the Grace product for which you are making this claim contained asbestos?

"A 1988."

The statute of limitations has passed for this claimant, long ago. Here's another one. 1992, is when they learned --

"Q First presence of asbestos in the property?

"A 1964.

"Q When learned that it was a Grace product?

"A 1992."

Again, the statute of limitations has passed.

Another area where we can easily ascertain whether there is a defense or not, is product ID, because we asked for product ID in these claim forms. Now, this is a claim form that was filed, I guess, by Mr. Speights, on behalf of -- this is kind of anomalous. The client, or the claimant listed here,

is not an individual, or even a company, it's an address in the -- on the street. That's apparently who the claimant is, is a street address.

"Q And what's the claim for?"

It says -- well, we gave an opportunity for them to say Monoco 3, which is a Grace product. It says,

"A Other. Surface treatment."

There is no Grace product that's specifically identified. There's no name, there's no nothing. It's simply surface treatment. Well, that's not appropriate product ID. You can't file a claim against a defendant, saying, well, I get surface treatment on my property, you made surface treatment at some point in time, therefore, it must have been yours.

That's not how the law works. We've got dozens of other examples that are similar. And that's why, when we come back and we take a look at these common issues, that is issues that we're able to resolve on the basis of the claim forms, you can see that, overwhelmingly, this claiming population is going to shrink dramatically.

One of the things I should point out is that, again, under the Federal Rules, Daubert applies. And, Your Honor, I'm -- probably is aware that in the Armstrong case all property damage claims were subject to a bar date. The claims came in and we then litigated on a common basis for all the claims, the question of whether air sampling or dust sampling, which was

appropriate? Could dust sampling suffice? Because, most of the claims were based upon dust sampling. And we litigated that as a Daubert proceeding.

Judge Newsome, who I think started out being skeptical of the entire enterprise, ultimately concluded that the -- so-called indirect method did not satisfy Daubert standards. All of those claims, therefore, were going to pass by the way, because they didn't clear Daubert.

Very simple, hundreds of claims resolved at the stroke of a pen.

If you take a look at what the air sampling is going to show -- what the air sampling, not the dust sampling, but the air sampling is going to show, with respect to probably all of these buildings that are being litigated, is that the dust concentrations are so small as to be totally inconsequential.

We will -- we believe we'll be highly successful in bringing to bear exactly the same analysis that drove the dismissal of -- drove the Daubert determination, with respect to all the property damage claims in the Armstrong case.

What's the answer that the property damage claimants bring to bear here? They say, you've got to do it claim by claim. You can't to it in the aggregate. I'm sorry. There is nothing in the estimation case law that says that. Nothing whatsoever.

In fact, if you look for the authority that they

cite, all they can cite is a law review article, whereas, in fact, estimation has been done on an aggregated basis, repeatedly. So, there's no legal impediment here.

With respect to ZAI, I want to talk very briefly about ZAI. Your Honor, I know, is intimately familiar with ZAI. Probably more than you ever wanted to be, but I want to go back to an argument that we actually had in Delaware, in March of 2002.

And I remember that argument very well. We talked about class action procedure, class proofs of claim. We talked about whether -- who -- people who picked up ZAI in their attics were all of a sudden going to get sick, and the like.

And at the end of the day, Your Honor said, look, I would like to know more about the science before I irretrievably go down this road. I'd like to know more about the science and, therefore, is there some way we can tee up the scientific issue first, so that on the basis of what I then learn, we can be more intelligent about whether we want to go out and talk about a class action that involves hundreds of thousands of people.

So, we went down that road and we did the science trial. And the science trial's now under submission to Your Honor. The suggestion has been made that somehow we're walking away from all of that. And we are absolutely not walking away from any of it.

When Your Honor determines what should happen in connection with the science trial, that's fine. What we want to do is to start to go down the road to create the bankruptcy process that will then serve as the vehicle to give affect to whatever it is that Your Honor determines.

And what is that process? We need a bar date. We need to find out who actually is going to assert a claim. Until we've got those people, you can't even think about taking a vote.

They say, well, let's just do a claim form on behalf of everybody and then we'll estimate how many people there are. Well, you don't estimate a vote. You don't estimate a number of dismissals. You need the claimants there.

Once you have the claimants there, you can do all of the different things that are necessary. You can determine who's going to be bound by the estimate. You can determine whether claims should be dismissed. You can determine whether, in fact, people are entitled to vote and if so, who they are.

So, we need a bar date, Your Honor. We need a bar date, first and foremost, in connection with the ZAI case.

And in that regard, we've changed the claim form that we're prepared to submit -- the initial claim form, so that it requires minimal information. In other words, people don't have to go up to their attics and rummage around in whatever their insulation in their attics might be. All they have to do

is to say they are making a ZAI claim.

So, we've got a process that should be very, very easy. You know, there's no issue of risk, even though, as we've pointed out to Your Honor in connection with the ZAI science trial, the EPA itself has declined to find that there's a linkage between ZAI and any health effects.

But, be that as it may, we don't have to reach those issues. We just have to go forward and create a bar date, in order to move forward.

So, we think that we very responsibly crafted these motions to adhere to the letter of the rules, so that we can go forward with this case.

And while Your Honor, I know, is focused on these threshold issues, and it may be that some of these implementation issues can wait, the issues that can't wait are to get that bar date going with respect to personal injury. That's going to take time, to get the ZAI bar date. We've got to get that done.

And with respect to -- property claims, we're poised to now get yield and benefit from the work that's been done. The proofs of claim have all been analyzed and we're prepared to proceed.

And that's all that I have, Your Honor, this morning.

THE COURT: All right. Why don't we take a ten-minute recess and we'll reconvene with anyone who wants to

start, in whatever form you've decided.

THE CLERK: Folks on the phone, there's someone who does not have a mute button on. Please mute.

(Recess)

THE COURT: All right. We're back on the record. Have you folks set up an order of who's going to discuss your objections first? Mr. Lockwood?

MR. LOCKWOOD: Yes, we have, Your Honor. And we'd also like to propose that, on this side at least, we address the voting issues and disclosure statement, collectively first, and then deal with the estimation issues, so that we don't wind up with people going on and on.

It's easier for, we think, for the Court to focus on one issue at a time, rather than sort of a stream of consciousness all the way through, if that's acceptable --

THE COURT: Well, I think that's true.

MR. LOCKWOOD: -- to the Court.

THE COURT: Yes. That's fine. But, I'm not sure about the voting issues. I mean, the debtor hasn't really addressed that, or are you talking about with respect to estimation and --

MR. LOCKWOOD: I'm talking about impairment, Your Honor.

THE COURT: In the impairment. Okay.

MR. LOCKWOOD: And in 524(g).

THE COURT: All right.

MR. LOCKWOOD: Your Honor, I think one of the things that is critical for us to focus on, because it's really -- demonstrates that basic fallacy of the debtor's argument here, is the -- the interpretation or description of the PPI case, which, I must say, we agree with.

The PPI case said that a limitation on a claim that is created by the Bankruptcy Code itself, is not impairment, and contrasted that with limitations that are created by the plan of the debtor.

The debtor would have you believe that there's nothing in its plan that affects the rights of claimants, because everything that the debtor is proposing to do here is in some way or another mandated -- mandated by the code. That is simply and blatantly false.

And it can be just, I think, best illustrated by thinking about what I -- unimpaired tort claim, in a regular old bankruptcy case, frequently involves. And that's a pass through. A plan can pass through tort claims, in which event they get litigated post-confirmation, in the State tort system, and the reorganized debtor pays whatever the outcome of that is. That's unimpaired.

Here, the debtor has chosen, in its plan, not because the law says they can't pass through claims, but they have chosen to create a trust, which they are going to channel the

existing and future asbestos claims to, and they are going to ask this Court to do an estimation, for the express purpose of limiting the amount of dollars that will be available to the claimants whose claims are going to be channeled to that trust.

They -- and their proposed case management order, with respect to those claims, has two pieces to it. One's their so-called settlement option and the other is the so-called litigation option.

The Court's estimation process is supposed to predict the outcome of both of those procedures. How many people will settle for the settlement values and how many will qualify and settle for the settlement values.

And, then, how many people will litigate and what the outcome of that litigation will be in the context of which, as the debtor has acknowledged, the litigation option provides no limitations on what any claimant can recover on their individual claim. They can get punitive damages, they can get pre and post-judgment interest, and they can get very, very large numbers of compensatory damages.

And at Page 21 of our brief, we list some of Grace's pre-petition history -- in the estimation brief. We list some of the debtor's pre-petition history, which shows verdicts in the millions, or hundreds of thousands of dollars.

So, there's nothing in their plan that prevents the trust from running out of money, no matter what the Court does

by way of an estimation.

They acknowledge an estimation is just that, it's an estimation. It's a prediction. It is not an allowance.

The Court will not have gone through and allowed each and every present and future claim, and have those claims fixed. No claim, not one, is supposedly being allowed as part of this process.

So, what -- how is any of that mandated by the Bankruptcy Code? This is all a carefully crafted, I think -- at one point, the debtor uses the phrase, integrated vision, to describe this. It's their plan.

The CMO is not something that the Court has proposed that we create, so that we can litigate, in a claims allowance procedure in this case, individual claims for allowance purposes. It's -- it's basically what ought to be part of the TEP, and in -- functionally, that's exactly what it is.

Because, what the case management order does is it tells everybody how the people that exercise the litigation option, under the plan, will then have the trust liquidate and pay their claims. It's not a bankruptcy process, at all.

So, the notion that -- I mean, it may well be that the various procedures that are reflected in various provisions of this plan are permitted under the Bankruptcy Code, but they're permitted only with respect to people who choose to utilize them.

And certainly the creation of a trust, and the proposal of a post-confirmation claims management process, is something that isn't mandated by the code and it is a limitation.

For people who -- if the trust in fact runs out of money, what the plan will do, just among other things, is it will prevent them from suing not only Grace, which is at least somewhat typical of what a bankruptcy plan does, but it will prevent them from suing people who they could normally sue under 524(e) of the code. Namely, co-obligors.

And that's a provision that's in the plan. There's the --

THE COURT: Well, Manville's run out of money --

MR. LOCKWOOD: -- if anything, it's an override of the code.

THE COURT: Well, wait. Manville's run out of money several times, and yet what continually happens is they go back to Court, they say it's out of money, and something happens and it gets refunded. Why would that be any different if Grace ran out of money -- in the trust?

MR. LOCKWOOD: Manville, the people voted on the -- we are discussing, Your Honor, not whether or not the plan, in some abstract sense could, if it was appropriately confirmed, have a fund which might prove to be insufficient. That's a no brainer.

We accept the proposition that in any properly confirmed 524(g) case with a trust, there's always the risk that the trust is going -- out of money. And it's that risk that creates the impairment here, because absent the plan, which it lacks, to create the trust, and channel the claims, and provide for limited funding, that risk, where the claims pass through, would not exist.

People would be able to sue whoever they could sue, and get whatever they got, and there wouldn't be any limitation to a single fund, in a single place, and a single entity.

THE COURT: But, surely, that's what 524(g) specifically was put into the code to do.

MR. LOCKWOOD: It was put into the code to permit debtors --

THE COURT: Right.

MR. LOCKWOOD: -- to propose plans that would do that. But, it wasn't put into the code to require debtors to -- remember what the argument, going back to PPI --

THE COURT: But, wait.

MR. LOCKWOOD: -- is, Your Honor.

THE COURT: Wait. I don't want to leave this for a second. 524(g), to the extent that the debtor chooses to use it and the creditors vote so that the plan is confirmable -- or in the debtor's viewpoint, I guess, unimpaired creditors don't have a chance to vote -- if that's true -- let me just assume

for the moment that it's true -- however the plan gets confirmed, with a 524(g) trust in it, Congress has said that the impairment, as you describe it, of the tort claimants, is appropriate. That those claims can be channeled to the trust and that the injunction provided by the trust can be extended to certain contributors to that trust.

MR. LOCKWOOD: The -- but Section 524(g) doesn't tell you how much money the debtor's got to put into the trust.

THE COURT: No, it doesn't.

MR. LOCKWOOD: The debtor, here, is the one that's proposing the plan that involves that, and moreover, the -- one of the problems with the debtor's CMO, for example -- I mean this is -- since we're talking about 524(g) we've gotten a little bit of a tangent.

But, for example, how, under the debtor's plan, are you going to ensure that present claimants and future claimants get treated substantially the same --

THE COURT: You do an evidentiary hearing.

MR. LOCKWOOD: -- if the present --

THE COURT: Oh.

MR. LOCKWOOD: -- if the present claimants run through all of the money.

THE COURT: Well --

MR. LOCKWOOD: Remember, what they're proposing is a capped plan. We don't know how much of the billion four

hundred and eighty-three million that they're proposing to put in the fund, for what they call the symptomatic eligible claims, is. But, that's a capped piece of it.

And the litigation option is available to every single present and future claimant. If people don't find the settlement option matrix attractive -- and that matrix is a take it or leave it option, you either qualify and take the exact dollars there, or you litigate.

There's no way of -- unlike typical matrixes where you have individual review and this, that, and the other thing, there's no way of varying it. It's just a pure -- open-ended settlement offer.

So, there's no assurance that anybody is going to take it, but one would suspect, looking at it from an economic point of view, that the people who take it would be the people who had what they -- who considered they had less valuable claims, because the numbers are quite low.

I mean the dollars for a Mesothelioma claim are $70,000.00, for example. I'm sure --

THE COURT: Well, isn't that something that could be handled in the voting process, to find out, you know, put on the plan form, will you accept a settlement option? And if the --

MR. LOCKWOOD: Well, that's what they've --

THE COURT: Yes.

MR. LOCKWOOD: That's what they've proposed to do in the questionnaire. I mean, again, we're getting a little bit far -- the problem with that is that people are being compelled to make the election of whether they'll take the settlement -- the litigation option, without knowing whether they'll qualify.

THE COURT: Oh, no.

MR. LOCKWOOD: Because, the settlement option is not, if you do X, Y, and Z, I'll pay you the money. It's, if you come in and provide me with certain types of medical evidence and exposure criteria, which the trust --

THE COURT: No. Wait.

MR. LOCKWOOD: -- is going to review --

THE COURT: Let's stop a minute. We're getting way afar afield.

MR. LOCKWOOD: Oh, yes. We are.

THE COURT: With respect to the issue of the voting, I think that the question could be put on the plan vote, you know, do you intend to apply for the settlement option. It's not whether you'll qualify. You still have to go through.

But, for figuring out whether the -- trust is adequately funded, certainly somebody's estimate that they will or won't accept the settlement option, goes along way toward deciding how many people will, and how many people won't, and how many are going to go into the tort system to litigate. I think --

MR. LOCKWOOD: Well --

THE COURT: -- that issue can be addressed --

MR. LOCKWOOD: Let me --

THE COURT: -- in the vote. The choice can be addressed in the vote.

MR. LOCKWOOD: But, they're not proposing to have people vote, so their -- under their plan, then, that issue wouldn't be addressed.

THE COURT: Well, then, how -- if their case management order is approved, then it would come into the questionnaire that goes out. So, I mean --

MR. LOCKWOOD: Well, let's keep in mind, their case management order addresses only the post-confirmation handling of claims by the trust. What they have tied it into is their estimation procedures motion, which as the chart over there points, under -- after the bar date, has a questionnaire. They want to use a questionnaire as part of the estimation process.

THE COURT: Well, that's okay, too. I mean --

MR. LOCKWOOD: And, you know, we can -- we'll speak to the estimation process when -- separately. I'm still trying to focus on the vote. Right now, there's no vote and so, whether you get help on your estimation, from a questionnaire, is a separate thing.

But, the fact remains that the plan caps the amount of funds available to people.

THE COURT: That's what I am troubled by in -- with respect to impairment, quite frankly. That without a claim by claims analysis -- and I don't know that you need one, in bankruptcy, for purpose of figuring out what the estimated amounts of claims are and the plan funding. I don't think you need to do a claim by claim.

But, for allowance purposes, for a post-confirmation payout, clearly you have to have some indication that the claim is not just allowable, but allowed in a bankruptcy sense. And that's what I'm trouble by.

The fact that if the claim is "allowed", at an amount that's different from the payout, there is impairment. You're not getting paid what you're entitled to on the effective date of confirmation. That's impairment.

MR. LOCKWOOD: Well, in particular, Your Honor, if you look at the definition of who gets to vote, under 1126, it says that -- in 1126(a), the holder of a claim or interest allowed under Section 502 of this title may accept or reject a plan.

They don't propose to allow any claims, as part of this process. They're going to have that done under the case management order, post-confirmation. So, in theory, they would -- they -- 1126 doesn't even enter the picture for people that don't have allowed claims.

As, Your Honor is aware, the way that problem has

been usually handled is by temporary allowance of claims, for voting purposes, with no particular effort beyond, you know, do you have a facial claim to do so. Because, it would take forever if you had to allow claims.

Here, of course, they say, we don't have to worry about this process, because we're not going to allow them to vote anyway, so it doesn't matter. And so that takes you back into the notion of, under PPI, does the plan create a different legal environment -- legal rights, than what would be the case in the absence of the plan, under the Bankruptcy Code, or whatever?

The PPI case dealt with the provision that said, with respect to lessor's damages, you shall compute them in a particular way, and that's what the statute says.

I challenge Mr. Bernick to cite to the Court any provision, in 524(g), or anywhere else in the Bankruptcy Code, that tells us that you can't do a pass through of tort claims.

THE COURT: Well, you can, but you don't -- maybe you don't have to.

MR. LOCKWOOD: I agree, but --

THE COURT: Okay.

MR. LOCKWOOD: -- if you don't have to, it's because you're given the election to -- to propose a plan which --

THE COURT: But, that's statutory --

MR. LOCKWOOD: -- creates a trust.

THE COURT: But, that's statutory, because the provision of 157, of Title 28, provides that when you have a tort claim that is adjudicated in the plan, the forum is the District Court. The District Court can elect to send it elsewhere into the State Court, if it chooses. But, the forum is the District Court.

There's nothing about that fact that the debtor says that if you choose litigation, you're going to do it in the District Court where the case is pending. In my view, that creates an impairment. It's a specific permission by the code.

MR. LOCKWOOD: I'm -- well, first --

THE COURT: And there is Federal preemption that still applies and it -- in my view, that's the statute.

MR. LOCKWOOD: The debtor has cited no case where 157(d) has been held to provide post-confirmation jurisdiction to a Federal Court to -- in -- to preside over litigation between a trust and claimants who have State Law claims. What 157(d) --

THE COURT: Oh.

MR. LOCKWOOD: -- does is apply during the pendency of the bankruptcy case.

THE COURT: That's right.

MR. LOCKWOOD: And their CMO does not apply during the pendency of the bankruptcy case, it applies post-confirmation.

THE COURT: Well, I'm not -- I'm not sure with respect to some of the things in the CMO.

For example, that this Court -- or the District Court that has to approve an injunction, if we get that far, would agree to undertake the litigation of all claims against the trust, in any event.

But, that doesn't mean that it can't be done in an objection to claim process, pre-confirmation.

MR. LOCKWOOD: That's true.

THE COURT: Okay.

MR. LOCKWOOD: And the debtor has consistently threatened, in its papers, that if this Court won't approve the case management order now, not withstanding that it's the District Court's docket that's going to get hit with the 118,000 present, plus, umpty-ump future claims, that they will revert to their original proposal, way back when, about trying to go through and litigate the claims.

And, you know, if that's where this proceeds, we can address that.

But, again, you know, the code permits you to do all kinds of things in a plan. It permits you to cram down dissenting creditors, for example, who have voted against the plan.

But, that's not the same thing as saying, if you provide, in a plan, that you're going to cram down people that

vote against it, that somehow or another that it's mandated, that you're not impaired, if they do that to you. I mean, the debtors --

THE COURT: No. In fact, the --

MR. LOCKWOOD: -- argument basically says, anything that's permitted under the code, I can do to you. And if I do it because it's permitted by the code, I -- when I do it to you, you're not impaired. That's got to be a tautology.

THE COURT: Well, it is a tautology, because the code defines impairment and I -- in some fashion, what you've just described, a cram down, could nonetheless constitute an impairment, and a creditor can vote.

The concept of impairment, as I understand what we're trying to address, today, is simply to determine whose claims may be -- I'll use the words, adversely affected. That's a bit too broad, but adversely affected by the plan in a way that creates an impairment of that claim, so that they can vote. That's all.

MR. LOCKWOOD: Right.

THE COURT: I think the best argument you have is the one you've already raised, which is that, at this point in time, we don't know that those claims, as allowed, will be paid 100 cents on the dollar, and if they're not, I think it's impaired.

MR. LOCKWOOD: And since we will never know, prior to

the time there's a vote --

THE COURT: Well, we may.

MR. LOCKWOOD: No. Because, even if the Court does the estimation, that's still only an estimate. And it -- and as we've discussed, the plan doesn't -- the plan uses that estimate to cap what goes into the trust, but the claims can, under the process, exceed, when they're allowed, the total amount of assets that are in the trust to pay them. So --

THE COURT: Well, then you --

MR. LOCKWOOD: -- that creates a potential less than 100 cent --

THE COURT: Right. So, then you'll know you can vote.

MR. LOCKWOOD: Remember, to be unimpaired they have to --

THE COURT: But, then you'll know you can vote.

MR. LOCKWOOD: Well, that's true.

THE COURT: That's the whole point. Okay.

MR. LOCKWOOD: But --

THE COURT: So, the estimation process can indeed determine who will vote, because --

MR. LOCKWOOD: No.

THE COURT: Well, sure it can.

MR. LOCKWOOD: I don't think so, Your Honor, because the estimation process, by hypothesis, is not a claim by claim.

THE COURT: That's right.

MR. LOCKWOOD: And what 1126 says is that each claim holder has to be unimpaired, if they're not going to vote.

THE COURT: If -- well, it says that -- right. Every person who is entitled to vote has to be unimpaired.

MR. LOCKWOOD: Has to be unimpaired.

THE COURT: Right. So --

MR. LOCKWOOD: And so if there are -- if there's a possibility that --

THE COURT: Any one.

MR. LOCKWOOD: Let's go back to Manville.

THE COURT: Look, the issue for this is, if there's a possibility that any one claim within that class is impaired, the whole class gets to vote, under the plan.

MR. LOCKWOOD: Exactly.

THE COURT: Because, you're not separating out unimpaireds from impaireds. So, okay.

MR. LOCKWOOD: And my point is that an estimation cannot guarantee you that everybody will get paid 100 cents on the dollar, because the estimation is an aggregate estimation. And it's just that.

Remember what happened in Manville --

THE COURT: Yes, but look at it the other way. It can, in fact, determine whether or not you won't be paid 100 cents on a dollar, and if that's what the conclusion is, then

you vote.

So, it's still worthwhile going through that process, because if there is sufficient evidence to show what the aggregate claims are, and the cap isn't big enough to cover those aggregate claims, than either the plan has to be amended to make sure that it is enough to cover those aggregate claims, or everybody votes.

MR. LOCKWOOD: Well --

THE COURT: And, frankly, I'm very uncomfortable with a process that imposes a 524(g) injunction that doesn't permit creditors to vote anyway.

MR. LOCKWOOD: Well, I would like to address that. Mr. Bernick went on, at some length, about how 524(g) is just a, sort of a little add-on -- parasitic, I think the phrase he used -- and so you should treat 524(g)'s voting requirement as though it was 1126. The fact of the matter is that that's just dead wrong.

For example, the -- 524(g), it effectively redefines the term claim, under 1015. Because, that's what demands are.

THE COURT: No. It says --

MR. LOCKWOOD: 524(g) --

THE COURT: -- specifically, it's not a claim entitled to vote.

MR. LOCKWOOD: I understand.

THE COURT: Okay.

MR. LOCKWOOD: The point I'm making though is that 524(g) is the only section of the Bankruptcy Code that specifically empowers this Court to deal with things that aren't claims.

THE COURT: Well --

MR. LOCKWOOD: Demands, by definition are --

THE COURT: Oh, by demands. Right.

MR. LOCKWOOD: -- defined as not being claims --

THE COURT: Claims.

MR. LOCKWOOD: -- in the case.

THE COURT: Right.

MR. LOCKWOOD: And so 524(g) isn't just some, you know, oh, gee, we'll have a super-majority vote, but otherwise it's the same as any regular commercial plan.

THE COURT: But the demand holders don't vote.

MR. LOCKWOOD: I understand.

THE COURT: Okay.

MR. LOCKWOOD: But, I'm addressing the question of whether 524(g) is merely a little bit of a change in the voting requirement, which is what Mr. Bernick tried to portray it --

THE COURT: Oh, the numerical change.

MR. LOCKWOOD: -- or whether it's actually a stand alone provision.

It's an exception to 524(e), because it allows you to protect non-debtor affiliates. It specifically says it's an

exception of 524(e). It deals with demands that aren't claims under the code and it also deals with -- who does it say is entitled to vote? It's not merely 75 percent.

If you look at the statute, it says that the people who get to vote are claimants. And who are the claimants? They are people who -- a separate -- this is 524(g)(2) -- boy this is hard to read -- (B)(IV)(bb). It says a separate class of the -- or classes of the claimants whose claims are to be addressed by a trust.

You'll notice it doesn't use the word allowed, there, while 1126(a) does use the term allowed. And that's who gets to vote, is the holders of allowed claims.

So, not only does it change the percentage, and eliminate for at -- or ignore the amount requirement -- in a 524(g) plan there is no requirement for two-thirds in and out, that's back in 1126. But, it also effectively eliminates the requirement that the people that get to vote have allowed claims.

And in deed, in -- it's -- because 524(g) contemplates that you can channel claims to a trust, not only future claims, but present claims, and allow them to be resolved, post-confirmation by the trust, by hypothesis you don't need to allow claims in a 524(g) case. You can just channel them.

And so, if you limited yourself to -- who is entitled

to vote under 1126, nobody would be entitled to vote, whether or not the 524(g) trust impaired people's claims or not. Because, nobody would have an allowed claim. So --

THE COURT: But, they will if we have proofs of claim, because we can determine it through that process.

MR. LOCKWOOD: Or if we have a ballot --

THE COURT: Or a ballot.

MR. LOCKWOOD: -- that performs the same function --

THE COURT: Right.

MR. LOCKWOOD: -- which we've had in a number of cases. So, it's just -- to say that because in the legislative history -- I mean, there's much made in their papers about how the term vote and accept is used interchangeably. They -- and indeed, at one point, they say -- they give you a litany -- the code, the legislative history in the cases. Well, in fact, they don't cite a single code provision that equate accept with vote.

What they cite are one of the Bankruptcy Rule provisions where the two terms are used somewhat interchangeably, and then some statements from people on the floor, who were dealing with the definition of impairment, when that was changed in the '78 code, and weren't even speaking about 524(g) at all.

They don't have a single quote, from anybody in the legislative history of 524(g,) saying that somehow or another

524(g) is just an increase in the acceptance requirement under 1126. And there's nothing in 524(g) that even cross references 1126.

And as I just said a few minutes ago, the universe of people that are entitled to vote is broader, because it's not limited to -- by its terms, at least, it's not limited to people with -- who hold allowed claims.

So, the -- in sum, what you've got here is a situation where the debtor's plan provides for a -- not for a pass through, but a limited capped fund, which could run out, as Manville did in fact do, and result in people not getting paid 100 cents, which limits peoples' rights to sue non-debtors.

Again, 524(g) is permissive. There's nothing in 524(g) that mandates that there be anybody other than the debtor --

THE COURT: Well, tell me --

MR. LOCKWOOD: -- that's freed from future liability.

THE COURT: Tell me, in your view, at what point I have to determine impairment. Is it as of the time of the vote? Or is it as of the time of the effective date of the plan? What is the date by which impairment is determined?

MR. LOCKWOOD: Well, since people only get to vote, under the debtor's analysis, if they're impaired -- let's put aside the 524(g) issue, because there really are two issues --

all -- because this is a 524(g) plan, they tend to merge, but there's an 1126 issue -- and then, if you decide they're unimpaired under 1126, you still have to decide whether that applies in a 524(g) context.

But, going back to the 1126 issue, since you have to decide who gets sent ballots when you approve the voting -- the disclosure statement. That's why we're here. They've proffered up a disclosure statement and they've got -- want to send it out for a vote.

So, we have to determine, now, whether or not the -- under their plan, and applicable law, the people who -- whose -- are in Classes 6, 7, and 8, the PI and PD claimants, are impaired under their plan. We have to determine that before the vote is done. And that's why we're here.

I mean, Mr. Bernick made some comment about, well, gee, Judge, this is a complex issue and we have to decide, you know, you shouldn't, in effect, ever rule that something's patently unconfirmable --

THE COURT: Well, wait. Let me stop you again. Because it seems to me that maybe it is simple. How is it that if I permit the claimants to vote and it turns out that the claimants are in fact unimpaired or somehow ineligible to vote, under 524(g), I can simply then disallow those votes.

MR. LOCKWOOD: Exactly.

THE COURT: Right. So, why do I take this issue on?

Why don't I just say --

MR. LOCKWOOD: Because --

THE COURT: -- fine, they can vote.

MR. LOCKWOOD: It seems perfectly sensible to me.

THE COURT: Me too. So, that's the ruling. They can vote. Now, whether they're impaired or not, I'm not deciding now, but they can vote.

MR. LOCKWOOD: That could be a confirmation issue, because the debtor could, in effect, attempt to --

THE COURT: Right.

MR. LOCKWOOD: -- confirm the plan over the adverse vote, and then we would have a determination of whether or not -- it wouldn't be a cram down, per se, but it'd be the equivalent of a cram down.

THE COURT: My concern is, in this case, simply that I don't know, given past history of trusts, how to determine in advance that a trust is going to be adequately funded to pay all claims 100 percent, whether they're allowed in the bankruptcy sense, before that plan is funded, or whether they file claims against the plan, in a trust sense -- file claims against the trust, in a trust sense, and the trust is sufficient to pay those claims, as the plan provides, 100 cents on the dollar.

And unless I can make that determination, it seems to me I have to err on the side of letting claimants vote, and

with the view that they're probably impaired because the plan probably will not provide for a trust that pays all claims 100 cents on the dollar, either in the allowed sense, or in the sense that they're filed against the trust.

And rather than send out a plan for a vote that ignores that issue, it seems to me we're better off permitting people to vote and then dealing, in the plan context, whether or not that trust is adequately funded, which is a confirmation issue. And I think that's where the focus belongs.

So, it seems to me that all claimants -- the -- I'm talking about the personal injury claimants, at the moment, ought to be able to vote. How we go about that process, maybe is something that can be determined at a later date, but I think it's better to send it out for vote and deal with whether it was proper at the plan hearing.

MR. BERNICK: May I be heard on that, Your Honor?

THE COURT: Yes.

MR. BERNICK: Let me make a couple preliminary comments and then get back to that question, because it has -- I want to -- obviously, we're struggling with a practical problem, which is how to move this case forward where we don't really know how much the liability is. That's been the problem since the beginning of the case.

The argument is made that the only way to argue for, in a sense, statutory impairment as opposed to plan impairment,

is if the statute mandates a particular result.

THE COURT: Well, I don't know that that's the case and I'm not sure I accept that proposition. I'm not looking at the issue of the legal impairment. I'm looking at the practical issue that if creditors are not paid what they're entitled to in a liquidation analysis, on the effective date of the plan, then they're impaired.

So, we have to go through, A --

MR. BERNICK: Well, but, yes. Well, but now let's just deal with the practicality of just that dynamic, because that's what -- that's exactly what we're trying to solve through this plan.

We started out by saying that pre-confirmation you had to litigate. And no one can quarrel with our entitlement to do that. We're entitled to litigate and that matter is still pending before the Court. We're still prepared to go ahead and do that.

The argument, though, against going forward on that basis, the practical impediment is, how can you ever get to the point where you're going to litigate down to each and every last claim?

And if you follow through on what Mr. Lockwood is urging upon you, at the end of the day, who knows, even if you're down to a population that's a very small number of people, you will still never know that those claims will -- how

much they're really worth, until you actually go forward and liquidate them. So, we can --

THE COURT: Well, it can be done a different way. I mean, if you really want to do it, it can be done a different way.

We can figure out what the value of Grace is. We can figure out how much Grace, on a liquidation alternative basis would have to fund to put into the payment of the claims, through its trust. And if Grace, in fact, can provide that amount to the creditors, on the effective date, so that they would get everything they're entitled to through the Chapter 7, then those creditors who get paid in full would not be impaired and those creditors who wouldn't be paid, will be impaired.

MR. BERNICK: That's --

THE COURT: Now, it seems to me that the issue -- now, I'm not saying that's the means all and end all for trust funding. I'm trying to get the issue -- to the issue of what the minimum amount that has to go to payment of creditors through the plan is -- minimum amount -- and with that minimum amount, where the impairment will lie. It seems to me we can get there.

Probably what Judge Wolin had set up in some other case, at the outset, might even be the way to do it. Estimate the Mesothelioma claims first.

MR. BERNICK: Okay. Well, here, let's begin with

that, because -- I'm going to draw a line here and talk about 75 percent, in a moment.

But, we've proposed here, and in fact we proposed to Judge Wolin, himself, that we take the population of present claimants, as people who actually have claims that are pending, and that we value precisely that population of people.

THE COURT: Okay.

MR. BERNICK: Okay. And if you're saying for -- if what you're saying is if we went ahead and did that, and we came out with a dollar amount, and we provided for that in the plan, then these people no longer can complain that they're impaired, because we're going to pay them 100 cent dollars on the effective date. It seems plain.

The issue becomes, how do you go ahead and do it? Do you do it through an estimation process, where you gather up information with regard to the present claims, through a claim form, and come up with an aggregate number, or do you do it through a litigation process, where you submit exactly the same claim form, but you then determine, for ultimate allowance and disallowance purposes, which claims are valid, and for how much?

Now, to the extent that you're asking for the claim form information, they're the same -- to the extent that you're following the evidentiary and Civil Procedure Rules, they're still the same. But, this gives you the flexibility of coming

up with what that overall dollar amount is.

Whereas this, they're going to tell you, requires that ultimately -- even though we may strip away, let's say 50 percent of the claims, on the basis of common issues, that there are still some other claims which are not stripped away that seem to have some survivability. And they're going to tell you, we don't know how much they're worth until they get a Jury trial.

THE COURT: But, you're focusing on the claims and I'm focusing on the enterprise. It seems to me that, for the liquidation alternative, the first thing you have to do is value the enterprise.

MR. BERNICK: That would be relatively non-controversial, but I don't think that that's going to solve -- that's not going to solve the problem.

And the fact that we went through this in connection with the fraudulent conveyance litigation, you know, we can value Grace and what Grace is worth, that's not the issue. The issue is defining what the liability is.

And yes, we can define the liability of this group of claims, and we can set that dollar amount aside, we would love to do that. That's the whole purpose of exactly what it is that we propose.

But, issue one is, do you do it through estimation or litigation? We'll take it either way. Anyway that you want to

get to that dollar amount is fine.

But, they will tell you that the estimation is not binding on the individuals. That -- that dollar amount is not enough to get us there. 502(c) is not an answer. It can't be binding on them. This can't be a capped amount. They'll reject all of that.

And in doing so they'll do ultimate violence to the code. The code specifically called out, in 502(c), that if litigation was going to take too long, estimation was the way to go. That is not an impairment. Especially in this case, where we've been prepared to litigate.

We've been wanting to litigate for the last two or three years. As a practical matter, the Courts have told us, you can't do that. You've got no choice, you must estimate.

So, we say, okay, we'll estimate. And they then say, well, you can't estimate either, because that's not going to be binding on it. So, I'm shot.

The law has got to provide a way for determining what these claims are worth, so that A, we can figure out whether they're entitled to vote and B, we can fund the trust. There has to be a way.

And it's not impairment, if we choose the two methods, and we present to the Court as an alternative, tell us which one you want.

Now, in point of fact, they don't want any of it.

They don't -- and the reason that they're arguing impairment has nothing to do with any of that. What they want to do is to exercise what they believe's their absolute right to vote, in order to block anything that we do. Nothing -- under their analysis, nothing that we do enables them not to vote.

And as soon as they have to vote, they'll always vote against the plan that doesn't give them the money that they think they're entitled to.

So, what they're really saying to the Court is, this is a 524(g) case, Third Circuit said 524(g) is the only way to go, we get to vote, we absolutely get to vote, you can't impair us, at all, and without liquidating every single one of our claims to find out if they're valid or not, we get to vote and we're always going to vote against you.

That is not the code. If that's the code, we're all kidding ourselves for being -- we may as well go home.

THE COURT: If that's the code, then the alternative is that the debtor liquidates. I mean, and if somebody thinks that that's the best alternative, with a company that appears to be viable, I guess I'd like to hear it. But, that's the alternative.

MR. BERNICK: Well, I don't think we even have to do that. I think that there is an alternative. The alternative is twofold.

One, we are happy to go down this road and litigate.

We are not prepared to give up the enterprise value, because we're being held hostage by a false interpretation of 524(g).

If the newspapers read out tomorrow -- if Congress were in tomorrow, then this Court -- the Courts are announcing that 524(g) means that no matter what's been said about whether these claims are valid or invalid, when their experts -- when the lawyers stand up and say, these are bogus -- that everybody in the world knows that these claims are bogus. The only way that -- only reason we're debating it here is because we have counsel who are showing up and saying, we don't really know if they're bogus or not, that all has to be determined down to the last detail.

If the rule coming out of this Court is that all those bogus votes get to vote, and they are absolutely entitled to do so, and it's a blocker, then we're saying, well, what are we doing here? There's just no point in --

THE COURT: Let's go back to Congress. Will that be enough to get the legislation passed?

(Laughter)

MR. BERNICK: Well, I think if -- I think Mr. Lockwood's clients are counting on being able to have it a little bit both ways. They don't want this process to be a viable way of deciding liability. They don't want the legislation to pass. And the consequence of which is, guess what, the tort system, as it stands today, is just fine.

But, Your Honor, I don't think we have to reach that, because --

THE COURT: But --

MR. BERNICK: -- this is such an extreme interpretation of --

THE COURT: Wait. Let's --

MR. BERNICK: -- 524(g).

THE COURT: Let's go back, for a second, to the litigation process that you're proposing, and the estimation. Define for me what the difference is, in the debtor's view, between the estimation and aggregate and the litigation process that you want.

MR. BERNICK: Okay. I will do precisely that. Let's assume that we have a population of claims that is -- I'll draw it as a bar -- that was filed pre-filing. So, they're all sitting out there. They're --

THE COURT: You mean in the tort system? Their --

MR. BERNICK: In the --

THE COURT: -- their own claims.

MR. BERNICK: Yes. They were in the tort system, that's correct. We'll say there are, I don't know, 50/75,000, whatever they are. We'll say 75,000 claims.

We establish a bar date for these claims -- these claims. What does that mean? That means that everybody who is there has now got to come in by the bar date and assert their

claim. So, we have bar date.

We then say, you've got to do the claim form. So, the claim form will then be sent out and we will then get back information. And we will identify, in this population of people, claims that are subject to various defenses, including Daubert types of review, to -- for example, all these medical records that come in from the screeners, should they even be -- are they a proper basis for asserting a medical condition, at all, to begin with? The --

THE COURT: And then you'll do omnibus objections to claims?

MR. BERNICK: I'm sorry?

THE COURT: And then you'll do -- the equivalent of an omnibus objection to claim?

MR. BERNICK: Right. And we did this in Babcock and Wilcox and we ended up with kind of what we called a road map.

And in Babcock we said, we want -- we're going to move for a summary judgment on all these things, because that was the case where we were just saying, let's go ahead and litigate.

Now, here's where there's the fork in the road. You've got, now, a population of claims. They're all stratified. You've got tons of information. What is the methodology that you now use, with respect to the same information? Because, remember, under the rules, you've got to

use the same evidence. The rules of evidence apply.

So, whether you're talking about litigation, or whether you're talking about estimation, the facts, the data, the evidence, they're all going to be the same. The difference is that, in the context of an estimate, you may be able to say, look, on the basis of this information I believe that X number of claims are going to be dismissed by reason of this, Y number of claims by reason of this, and you'll then end up with a smaller population, that you'll then estimate the value of, in the aggregate.

That will result in dismissing not a single claim. The claims will all still be there. Will you be able to take this filtering process down to the individual claim? Yes, you will. Because, all of those claims are present before the Court, in the form of claims forms that have been completed. They've all met the bar date. They're all here.

So, if you wanted to, you could take up the question of each claim. Do you dismiss it or not? Does it get to vote or not? You could do that. But, you don't have to. Because, all that you really have to do in the estimate is to come up with the overall dollar figure. You don't have to do anything else and you don't have to go through a process where you're bringing each individual claimant before the Court for the motion practice. You just -- you don't have to do that. Estimation gives you that kind of flexibility.

So, it's the same process all the way, but because the output is not the actual entry of an order dismissing or not dismissing a claim, you don't have to go through that aspect of the procedural process. You've got more flexibility.

There's also something else you can do. You can then, in estimation, take this result, which you've now got here, and you can figure out overall claim value.

So, you've got a population. You've got a snapshot. Remember, here you are, filing date, you're at a point and time in the history of the claims process and all these settlements. We take the date of filing and we take this population of people. That's who we just got all the information from.

You now know, from the estimation process, that only 25 percent of those claims are really -- have got anything to them. Or, put differently, that 75 percent are just never going to make it. We don't know that the 25 percent are either, but the 75 percent, certainly are not.

Well, then you have a basis. On the basis of -- you can either take an epidemiological curve, you can take a claims filing trend curve, whatever you want. You can then, with a -- on a statistical basis say, this is how it's going to be in the future. Not because there won't be more claims, but because the rulings that you've made, that are these threshold rulings, are going to be binding on people as they come forward in the future.

You, therefore, have a present value of a current claimant population, and you have a future claim population. So, you've got the ability to determine an overall funding level for the future.

So, the estimate both makes it easier to determine who among the current claimants really has a claim that's worth anything and also enables you to go from the current, all the way to the ultimate question of how much money should be in the trust.

Now, we would say that this is exactly what was contemplated about with 502(c), particularly in a 524(g) case. In a 524(g) case, this is exactly what you have to do to figure out how much money to set aside. That's exactly what's contemplated.

They will say, no, you can't use the estimate for that purpose, because at the end of the day, it may turn out that the money -- there's not enough money there.

And Your Honor says, yes, isn't that impairment? Well, if you -- if you stuck by that model, the model that says, so long as you can't guarantee that each claim will be paid his full value, as of the effective date, there is impairment, there is only one way to satisfy that test. Only one, which is to litigate.

They will say, each and every claim. That is not what the code says. The code says you estimate. 524(g) says,

you use estimates for purposes of determining what's going to happen with respect to future claimants.

And the interesting part about all this is -- I'll say this as an aside -- is that if you didn't go -- if this were not enough, and you did liquidate, and there weren't enough money in Grace, the future would get nothing. I mean, from the point of view of what's the actual liability, there is no actual liability for future claims. They're not entitled to be paid.

But, in 524(g), as a trade for the channeling injunction, you have to provide for them.

So, you read 524(g), together with 502(c), they create an alternative path. And it is the only path that we can follow, where -- unless you want to go down the litigation road -- but the only issue for today really is an impairment issue. And I think that that actually is a simpler one.

Whether or not Your Honor uses the estimate or the litigation, for purposes of determining this dollar number, and for that matter, the future dollar number -- whether or not you use that, either way you go, it has to be the case that once you have set aside that money, that they cannot use their vote as a blocking position to say, I'm sorry, it's not enough.

If that's the law, then 524(g) abrogates 502(c), it abrogates the litigation process, and it creates a strangle-hold.

And who are those 75 percent who are voting? They're people that all they have is a claim. That's whose -- that's who you're taking the vote from, is anybody who's got a claim. They're not allowable claims. They are not allowed claims. So, you're saying, there is impairment on the basis of a claim. That is just directly contrary to the PPI case.

The PPI case says, no, until you go through this entire process, you do not have the ability to say, I'm impaired. You don't have it.

And all that we're saying here is, take us through one of these processes. Any one of the processes. We'll work with any one of them.

But, you cannot allow people who have simply got claims, who are not entitled to the benefit of the impairment doctrine, to then maintain their vote and then say, unless we agree 75 percent, you're out of luck and you've got to litigate -- or liquidate.

THE COURT: Okay. Take me through your litigation model.

MR. BERNICK: On the litigation model, you start out with the same process of beginning with these claims here, the same bar date, to bring them forward, the same claim forms, or questionnaires, the same stratification, the same road map, but you would then have to take that road map and reduce this population down to a certain number of claimants, and disallow

all the others.

And we obviously know what that means. If we had all the motions, we could probably, in a litigation committee, you could probably do it, in something like Cimino, except that you couldn't extrapolate within the group. You'd have to take each one through. That's why we came up with the claim forms.

So long as you've got the common issues, you can do it under Rule 42, but you can't extrapolate from one claim to the other. They have to be genuinely a common issue. You then sort out this population, so that it's no more than, let's say it's this.

The other side would then say, that's still not something which you can put a binding dollar figure on. We now have to either settle those claims, or we have to litigate them to verdict in a Jury trial. Because, unless we do that, you don't know whether -- what the actual allowable amount is and, therefore, you don't know whether we can vote or not. That's limitation number one.

Limitation number two is that they'll say, well, we'll take this estimate here, we're happy to do that, but it's not binding on us. If the estimate shows that there's not enough money in the debtor to pay, it's binding on the debtor, the debtor's out of luck.

But, if you're going to tell us that the outcome is binding on us, that it produces a hard cap, no, no, no. You

can't give us a hard cap. We're entitled absolutely to that Jury trial. We've got to liquidate them claim by claim.

So, effectively, you can never produce a future estimate for any purpose other than to wipe out equity. You cannot produce it on a basis that will be binding on those individual claimants. And they then also will -- can say, that all these people are still entitled to vote and they'll vote against the plan.

THE COURT: But they're futures.

MR. BERNICK: No. The presents are entitled to vote.

THE COURT: Oh. Well --

MR. BERNICK: And they'll vote against the plan.

THE COURT: Well.

MR. BERNICK: So, the difficulty is that if you look to the -- if you adopt a viewpoint that says, we're going to ignore 502(c), we're only going to have straight litigation, you can never extrapolate, you've got to take each case down to verdict before you can say that the claim has got a fixed dollar amount, and you can't have post-confirmation litigation, because you'll never get to post-confirmation litigation.

Now, all of this -- I mean, they say, there's not precedent for having post-confirmation litigation in Federal Court. That's absolutely false.

In the Dow Corning case, we have a whole trust that's been set up for settlement purposes. We have a litigation

facility that's been set up. The litigation's all in Federal Court, unless by agreement it goes down to State Court, and the Federal Court has jurisdiction -- continuing jurisdiction. And the operative statute is -- in fact, 157(b)(5).

So, you can certainly do it. And that's really what we proposed. We've said, postpone the case by case litigation until later. We're okay with that. We don't have to do it now. But, then if you're going to do that, you need 502(c) to be able to set up the estimate such as you can go forward. Any other result would mean you -- you really can't emerge.

If you say, well, gee, that's a soft cap, not a hard cap, then the financial world will look at this company and say, oh, who knows whether we can finance it, who knows what we can do with it, we don't know what the liability is worth.

The whole purpose of 524(g) and the whole purpose of being able to set up the estimate, is precisely to create a cap so that the company then can emerge with good equity.

Is there a risk that people will not ultimately get paid hundred cent dollars? Yes, there is. That risk is always there in 502(c). You -- it is implicit in 502(c) that there's a risk for an individual not to get paid in full.

But, no individual has the absolute right to get paid in full, unless we went through the whole litigation route, or unless we go through the estimation route and the estimation says that there's enough to pay them in full.

Your Honor is adopting, I think, in a sense, the first blush reaction that people have to this impairment issue. It says, oh, I understand impairment, if they -- you know, I understand that their claims have got to be allowed, but if they're ultimately allowed and they don't get 100 cent dollars on the effective date, they're impaired.

And that's -- that is exactly the argument that -- with respect to the Court, was specifically rejected in the Third Circuit in the PPI case. The Third Circuit said, you cannot say that with regard to claims. Claims have got to go through this process. It's only allowable claims that get treated that way.

In the context of asbestos, in 524(g), you've got two paths to get there. And impairment doesn't say, oh, it's only one path that's legitimate. The doctrine of impairment says, look, if you're going according to the code, and estimation is the way to go, you're not impaired. Otherwise what's the point in having an estimate?

See, what they want to do is take the estimate and make it a one-way street.

THE COURT: Well --

MR. BERNICK: If the estimate's unfavorable to us, you know, there's no equity, but they don't want be bound by the estimate.

THE COURT: Is there a -- an asbestos, or silica,

some mass-tort case, it doesn't even have to be one of those, in which the Court has done the estimation hearing for purposes of allowance and distribution? Because, it happens in non-asbestos cases. I'm not sure why it can't happen in a mass-tort case. Has it happened in a mass-tort case?

MR. BERNICK: Here's what's happened in a mass -- there are. There's asbestos -- there's Dalkon Shields, there is Dow Corning. And in Dalkon Shields what happened was that prior to the plan being approved, there was an estimation done. It was done using specialized questionnaires.

The information that came in and a -- you know, it was -- a rubric was developed, of information. They then had estimates and the estimates came in at a -- on a wide range. And the estimate was done. And the estimate was for purposes of determining the total funding for the A. H. Robins claimants, not on a claim by claim basis. Total funding for all the claimants.

THE COURT: But, the difference in A. H. Robins, I think, is that there shouldn't have been a future class. I mean, women knew whether you had a Dalkon Shield or not.

MR. BERNICK: Well, it -- that's true. You -- you may have a future's class, but it's not a pure future's class. They may not have a claim now, they -- you didn't have an indeterminate population.

THE COURT: Right.

MR. BERNICK: You knew what the population was, but with respect to the arguments we've just gone through, it's absolutely apples and apples. That is, we're talking about whether you can, through estimation, reach a hard cap that is binding, without litigating each and every claim.

And that's exactly what was done in A. H. Robins. It was a hard cap. It was a hard cap, because that's all the money that was going to be there. And the money funded because they were able to sell the company for a number that was roughly the same amount as the estimate.

So, you have an estimate that is used to establish the total hard cap funding, without liquidating each and every claim, through litigation. It was done through estimation, and it was absolutely binding. It turns out the estimate was high. So, people got more money distributed to them, later on, when it turns out that there was more than enough money to pay the claims.

All the claims were then resolved post-confirmation, through a litigation process that was agreed to as part of the plan. But, at the time that the estimate was done, there was no agreement. There was no plan. There was -- the estimate was done for purposes of determining what the bogey was, so that the plan could be developed.

And that's exactly why you have the estimation procedure. Otherwise, you're litigating forever.

In the Dow Corning case, an estimate was done for purposes of determining the ultimate funding for a post-bankruptcy trust. Dow Corning was a consensual plan. A. H. Robins was a consensual plan.

In the Dow Corning case, the estimate was done after the vote already was taken. There was objection -- there were objections to it though. There was a contested hearing on estimation. The estimation was, in fact, used to demonstrate the validity of a hard cap.

Dow Corning is a double hard capped case. The hard cap was confirmed on the basis of an estimate. Claims will now be settled, post-confirmation, and they will be litigated post-confirmation. The settlement option is an option that people had to make an election to, up front. That's where we got the whole idea here.

So, you've two different cases where estimation was used to develop a hard cap without the need for litigating each and every claim.

In the 524(g) context, you'd say that the circumstances driving that same result are even more compelling, because you do have to provide for futures and the only way to provide for futures is estimation. So, you come back, all the way to the same thing.

We can either go down the litigation path and they'll be happy, because they'll get to try all their cases to a Jury,

if they want. We'll never emerge from Chapter 11. And until that final result is in, they'll say that everybody shy of a judgment gets to vote and you will never get 75 percent in, because, even at the end of the day, the people whose claims are successful and are going to get paid in full, if they have the -- they'll still vote against. They'll always vote against. These people will block vote against.

Or you can go down the estimation road -- completely consistent with 524 -- 502(c). You get your overall estimate in accordance with the rules, maybe like -- then by then, God bless, we'll have a consensual plan. But, the idea that in all of this, at the end of the day, all these people get to vote, goes back to the proposition that if you've got a claim, unless there's a final judgment saying that claim is disallowed, and it's final, not -- any appeal, they get to vote.

That is directly contrary to the PPI, and would render this case in -- the headline coming out of this Court will be, it is unbelievable -- and maybe this will drive the legislation -- but today, still, the Courts failed to come to grips with what everybody knows, is the same mass-screening claims are able now to force a company into liquidation, because there's no alternative.

THE COURT: Well --

MR. BERNICK: If that's what the law is, that's what the law is.

THE COURT: 524 really doesn't talk about classification of claims either. And the debtor has some flexibility, perhaps, with respect to classification of those claims, so that maybe the votes in certain classes can be taken, and if it turns out that certain classes were in fact unimpaired, those votes can, at that point, be disallowed, if they're against the plan, because they'd conclusively be presumed to have voted in favor of the plan.

So, although typically there is a trust that deals with claims, and the classification comes up in the trust process, I'm not sure you're prohibited from doing it in the 524 vote process.

MR. BERNICK: Well, what the -- yes. Let's play around with that. I'm not -- we're not averse to -- I mean, if you wanted to reserve on the issue of whether there's impairment, until we go further down the road and see where we are -- you know, we have -- that's essentially what we said today. We have no quarrel with that whatsoever.

We think it's vital to go down these paths to get more information to find out, you know, who the real claimants are. And we'd be perfectly happy to defer the impairment issue.

But, in point of fact, you know, if at the end of the day they're going to say, you know, 75 percent of all people got a claim, we're kidding ourselves. We're never going to

solve that problem, except if we recognize the impact of the impairment rules.

Let's talk about different classifications. We do have different classifications we tried to figure out perfectly consistent with what everybody in the outside world knows about these claims.

There are certain kinds of people who are really sick and there are certain kinds of people who aren't sick. Okay. So, we said, with respect to the people who are not sick, let's separately classify them.

Or people who can't really demonstrate that they've got any significant exposure to Grace product. In other words, the wrong industry people. We'll separately classify them.

We'll say, with respect to the people who are sick, and really do have a nexus to Grace, you know what, let's classify them separately and let's provide them with money. So, we did that classification. But, it's then got to be a hard cap. Why? Because, we could never emerge from bankruptcy, with this group of claimants, without having a marketplace see that there is an outer parameter.

And the case is completely -- they even recognize that equity can be preserved in exactly this fashion. And that's what the estimate is designed to do. It's designed to enable you to go on with life.

With respect to the asymptomatics, we've not asked

for any hard cap. We've asked for an estimate and we've said that we'll fund the trust with that estimate, and the estimate can't exceed a certain amount. But, we've not asked for a hard cap there. And these people, if they prevail, ultimately could get access to Grace's ongoing equity.

So, we have created through the classification scheme, with respect to these people, you know, I don't know what the argument is. I mean, they're getting access to Grace equity. All that happens is that they get litigated in Federal Court, which we've demonstrated is entirely appropriate under the code. But there's no cap.

With these people, we have to use the estimate to get a cap, because there's no alternative. We can't emerge from bankruptcy without it.

Now, these people, again, you'll find, that even if we litigate their claims down to the last claim, we spend the next ten years doing it, they'll still vote against the plan. They'll say, oh, Your Honor, I understand that they -- Grace has set aside enough to pay everything, but, you know what, it's not a final judgment, and we've still got concerns, and we're voting against.

MR. LOCKWOOD: Your Honor, I don't know who appointed Mr. Bernick, God, but he sat here all morning long and told us about how, no matter what this Court does, the plaintiffs are going to vote against the plan if the Court acknowledges that

they're impaired and have a right to vote.

He cites two cases where he says they were examples of hard caps. In both of those cases the plaintiffs got to vote, and they voted for the plan. Why's that? By Mr. Bernick's logic, if they got to vote, and they didn't like the estimation, they should have voted against the plan and they would have been in exactly the posture that Mr. Bernick is running around and ranting about.

This can't possibly be true. The code can't possibly allow this to happen, et cetera, et cetera. The code was not drafted with mass torts in mind. Section 502(c) was not drafted with mass torts in mind.

Indeed, the literal language of Section 502(c) talks about estimating a claim, for purposes of allowance. That's what it talks about. It doesn't say anything about estimating aggregate claims, much less estimating aggregate claims for purposes other than allowance.

If you go back and read their briefs, they spent a lot of time darting around the question of what this estimation really is for. They don't have the temerity to argue that the aggregate estimation is for purposes of allowance, because the aggregate estimation doesn't tell you anything about which creditor is going to get paid what.

All it is is a big number and most people regard it as feasibility. Feasibility -- what does feasibility mean?

Feasibility, under 1129(a)(7) is it means that the debtor isn't going to wind up going into Chapter 11, or as they call it, Chapter 22, within a near term.

It has nothing to do with allowing the debtor's equity holders, which is what Mr. Bernick is shilling for, let's make no -- this is not a situation unlike what's going on, for example, in Owens Corning, right now, in front of Judge Fullham, where there's a contested estimation hearing between two groups of creditors over the provisions of a plan in which everybody's going to get to vote over what the relative shares of those creditor groups are.

What this is, is Mr. Bernick running around selling the proposition to Grace, and others, that I'm going to save your -- your equity here, because I've got all these great novel ideas about how I'm going to change the Bankruptcy Law to convert what was created to be a mechanism for debtors and creditors to work out their respective claims, into a litigation vehicle which will enable me to defeat creditor claims on a mass basis and preserve equity. That's what this is about.

And the idea that this particular company is the poster child for this, and we're going to hear headlines about Grace, the last headline of which we heard was that they got most of their executives indicted, that somehow or another that if this Court says that the -- a statute that gives creditors

the right to vote means what it says, that the sky is going to -- fall, is poppy-cock.

We have listened -- I have had -- sat here and listened to more misrepresentations from Mr. Bernick, in the last half hour, than I know what to start with.

For example, he cites the -- he has now cited in his original remarks and his second remarks, the Babcock and Wilcox road map approach, and he starts -- and he give you these charts about the threshold, et cetera, et cetera. He said this is what we did and here's what the outcome of it was.

What he neglects to mention is two things. Number one, Judge Vance, when he -- she heard what he proposed to do with these omnibus objections, summary judgment motions, Rule 42 consolidated trials, concluded that she was going to spend the rest of her life handling stuff for Mr. Bernick's client and she didn't really have any interest in doing that, because she didn't think it was practical. And she told him so.

And Judge Brown lifted exclusivity and the next thing we had was a consensual plan -- low and behold.

And as for the results of their great bar date process, sure, we have a lot of self serving assertions by Mr. Bernick that were never tested. We never litigated the truth of this.

If I have to sit here and listen to him tell me about how everybody in the world knows that all these claims are

bogus, one more time -- he's not testifying here. This isn't evidence.

The fact that one disgruntled MISO lawyer, Steve Kazin (phonetic), makes some speeches in Congress about the kinds of claims he doesn't handle, namely non-malignancy claims, does not mean that somehow or another it has been proven, anywhere in the country, that you can't win a Jury verdict, and get it upheld on appeal, if for example, all you have is a 1 over -- /0 ILO reading in an asbestosis case.

Mr. Bernick and his crew have made up all of these great issues that they want to come in here and get you to rule on, categorically. They are so over simplifying the process.

The Bankruptcy Code gives people rights, as creditors, just as much as Mr. Bernick seems to think they give the debtor rights to run around and try and defeat claims. And among those rights are, if you want to disallow my claim, you've got to treat it as a contested matter. I get discovery against you, you don't just get discovery against me. The discovery is by rule.

There's nothing in the Federal Rules of Evidence or Civil Procedure, which he says are controlling here, that we have to do everything by, that -- has a questionnaire. You can do interrogatories, but they're limited in number and you get the answers that you -- and if you don't like the answers in the -- interrogatories, you can compel better

answers.

But, you don't get to categorically deny claims if you don't happen to like the answers to some interrogatory. They're just making most of this stuff up -- this process.

Maybe he managed to get it done in Dow Corning, I don't know. All I know is, ultimately, whatever happened there, people agreed to it.

And what he's trying to do here today is to say, I want to propose a scenario of simultaneous -- he's not willing to wait until the estimation is completed, so we know whether this -- if you want to use the term bogus -- bogus number that they've come up with of a billion four hundred and eighty-three million dollars to cover the symptomatic claims, and the PD claims, and the trust expenses, is any more than something they put out -- pulled out of their ear.

They litigated in the tort system for 20 years before they went into bankruptcy. All this stuff about unimpaired sick people versus non-sick people, they had plenty of time if they wanted to bring cases into State Court to get rulings from State Courts -- Supreme Courts that unimpaired, or non-sick, or asymptomatic people don't have causes of action.

The idea that there's a difference between sick and non-sick is not something that appeared on the radar screen for the first time in the year 2000. That's just ridiculous. They can -- they had the opportunity to litigate whether or not you

had adequate doses.

The fact of the matter is that -- the reason Peterson gave the testimony that Mr. Bernick helpfully quoted for the Babcock case was that the question was, how much of a dose, from Babcock and Wilcox products, did you get? And how much of a dose from -- and how could you show that exposure to a Babcock and Wilcox product caused your disease.

The fact is, that since Burrell, in the Fifth Circuit in the 1970's, it's been the law in every jurisdiction in this country that you don't have to prove specific causation by showing you got a dose of one defendant's product that, by itself, was enough to cause your asbestos related disease. All you have to show is that the amount of the dose that you got from this, among many other doses from many other defendants, was what's called in tort law, substantial contributing factor.

And it's up to a Jury to decide what -- how much that is. It's not up to Mr. Bernick and his experts to come in here and act like Judges.

As we pointed out in our response to the estimation process, which I thought we were going to get to separately, and I still hope we do, Mr. Bernick's proposal up here, for this estimation and how they're going to lower the number, he's going to turn -- he's got some expert in mind that he's going to make a Judge.

Because, what's going to happen is they're going to

take these questionnaires, and this expert is going to review the questionnaires, and the expert's going to decide what claims are valid, what claims have factual validity, and what claims have legal validity.

I don't know about you, Your Honor, but the last time I looked, that was a role for a Judge, and maybe a Jury, but it sure wasn't a role for some expert to come in here.

And the idea that he's going to get his number down to 25 percent, you know, that's just him. He's just saying that. I disagree with it. I think he's smoking something that ought to be a controlled substance, if it isn't. But it's certainly not something that your -- this -- Your Honor should be taking as though it was a proven fact in this courtroom.

THE COURT: I'm not taking anything as proven facts, Mr. Lockwood. I'm only trying to figure out how to get this case out of this process and get money to the people who are supposed to get it.

MR. LOCKWOOD: Well --

THE COURT: That's what I'd like to do.

MR. LOCKWOOD: I would respectfully suggest, Your Honor, that your -- the original suggestion that you had was the right way to go.

There's nothing in the Bankruptcy Code, or in the way these cases run, that indicate that we need to have a simultaneous estimation proceeding and dissemination of a

disclosure statement for a plan that's conditioned on the outcome of the estimation proceeding.

Right now, as the disclosure statement says, if they don't get an aggregate estimation from you that the symptomatic claims, and the property damage claims, and the future trust expenses are going to be less than a billion four hundred and eighty-three million dollars, they don't have a confirmable plan by their own terms, although they -- I guess they could waive it, depending on how much over a billion four eighty-three it is.

But, right now, that's conditioned on that estimation. And I see no reason why we can't go ahead with an estimation proceeding -- I dispute mightily the nature of it, that they propose -- but, I don't see why we can't go ahead with an estimation proceeding and try and move these balls forward. And we can --

THE COURT: So, what's your view about what the estimation proceeding should be?

MR. LOCKWOOD: Well, we had this fight in Owens Corning, in which the dissenting creditors wanted to have the same kind of elaborate process for evaluating claims, and filing, and bar dates, et cetera.

And Judge Fullham took the position that, I believe that you can do this through competing experts. I'll go ahead, I'll have a trial on the expert front, and if I decide that we

need more evidence, whether it be by bar date, or whatever, after I've heard the experts, I'll decide which ones I believe and I'll either conclude that the experts gave me enough to come up with an estimation, or I'll move on and we'll do some additional steps.

THE COURT: All right. But what's the purpose for the estimation then?

MR. LOCKWOOD: The purpose for the estimation, here, would be to give all of the parties to this bankruptcy some idea of what, for the trust, is likely going to have in the way of claims, for purposes of determining what kind of a plan.

Right now, the debtor's view of the world and the asbestos claimant's view of the world is widely divergent on the value of the future claims. And the only way anybody's ever going to get over that gap is to have some Court referee that dispute.

THE COURT: Well, I'm willing to do that. I just want to know what the process ought to be to do it. I've been saying since the -- since I got assigned this case, that if in fact I have the capability of doing it, I'd move it. I now have that capability, so let's go to it. But how?

MR. LOCKWOOD: Well, Mr. Bernick -- let me back up a minute. I, again, we're sort of jumping ahead to estimation and my brethren over here haven't had an opportunity to speak to the impairment issue at all, and -- I -- do you want to go

ahead with that right now, or should --

THE COURT: I'd like to try to figure out what pieces we need to do, and in what order, to get a plan proposed that, hopefully, will be a consensual plan. I'm not minimizing what the debtor has now, but it's obviously not a consensual plan.

So, if an estimation is going to do it, let's tee up an estimation hearing. Because, perhaps at the point in time when everybody gets at least some numbers from a Court that looks at it, subject to how ever many appeals you're going to take, nonetheless, at least you'll have somebody's view of what the -- that estimated number is going to be.

MR. LOCKWOOD: Well, right now Mr. Bernick wants you, essentially, to take his word for what the evidence ought to be in an estimation proceeding.

I mean, he's basically said -- he got up, and he drew his graphs, and he described Mark Peterson's methodology of going about estimating claims, and he says, that's ridiculous, because everybody knows the tort system is broken.

THE COURT: I know what he wants me to do. I had him go over it, very specifically, so I had no doubt about what he wanted me to do. What do you want me to do?

MR. LOCKWOOD: What I want you to do is to be -- is to tell the parties to meet and confer about having a case management procedure for the estimation proceeding, not for post-confirmation litigation, and have that teed up as the

battle of experts.

I mean, Mr. -- he -- Mr. Bernick's expert that's going to come in here and testify about how the torts -- if he wants to try and convince the -- you, that you need a bar date, and you need individual claims evaluation through questionnaires, et cetera, he ought to have an expert compete with our expert, over whether or not, as he incessantly says in a non-evidentiary concept, somehow or another Grace could actually prove that for 20 years in the tort system it was defrauded, routinely and regularly, into settling claims that had no value.

Because, if you think about what a real estimation would be like, in a regular tort claim, what you'd be estimating would be the ultimate resolution, after litigation, of the judgment or verdict that would result from that tort claim. That's what you'd estimate if you were sitting here looking at, you know, a big claim. We wouldn't be estimating what it could be settled for.

Why then do we talk about settlements in these estimation proceedings?

And I might add that Mr. Bernick's Rule 408 argument is wrong. It was rejected in Babcock and I can explain how, if the Court wants to hear it. But, the reason they do it is because it is perceived, generally speaking, to be more economically sensible.

The fact is that pre-petition and presumably post-petition, if you hadn't gone into bankruptcy, Grace, like everybody else in the world -- slightly less than Owens Corning, which tried to get -- litigate its way in the tort system and got hammered in the process -- but virtually everybody else like Grace, settled.

UNIDENTIFIED TELEPHONIC MALE ATTORNEY: -- in the Court. Yes --

THE COURT: Pardon me.

UNIDENTIFIED TELEPHONIC MALE ATTORNEY: You're not going to get a plan.

THE COURT: Pardon me. Somebody is speaking and we can hear your conversation. Quite frankly, I'm not interested. Please put your mute buttons on.

I'm sorry, Mr. Lockwood.

MR. LOCKWOOD: I lost where I was.

THE COURT: Owens.

MR. LOCKWOOD: Oh, oh, oh. They routinely settled cases in the tort system and they did it because it was cheap. They found that, to the extent that they tried to litigate claims in the tort system, while they won a lot more than they got dismissed voluntarily in the settlement negotiations, the cost of defending the claims, coupled with the very large judgments, including very large non-malignancy judgments that routinely resulted in those cases, made it much more expensive

to try and litigate your way out of these claims, than to settle them.

THE COURT: Well, that may be, but --

MR. LOCKWOOD: So --

THE COURT: -- it seems to me if Grace's expert doesn't want to look at the settlement history and --

MR. LOCKWOOD: No. That's right -- he -- Grace's expert can do anything he wants to.

My -- the point I'm trying to make is that we should, at a minimum try, as Judge Fullham is trying, to see if you could actually have an estimation based on a battle of experts. And if that -- if Grace succeeds in -- through its experts and other evidence that it wants to put on, in convincing this Court that that is an inadequate method for arriving at an -- at a good estimation, because they actually prove that somehow or another their settlement history is not a reliable basis for trying to figure out what their liability would have been had they not gone into bankruptcy.

Which is what this is all about. I mean, that's what we're -- we're not estimating here what the -- what would happen if Grace's TEP were approved, or something. That's not what you do. You -- determining the claim, you look at the value of the claim as it comes into the bankruptcy case, not as it goes out of the bankruptcy case.

And so we would propose to -- they can take their

best shot at showing it. But, what we don't think is fair, is for them to come in here and basically make all these assertions about bogus claims, and the tort system is broken, and our experts are all relying on ridiculous assumptions about tort history, and get the Court to buy into what we think is a wrong and unworkable estimation methodology of their own.

Because, again, if you look at what they propose to do, when you get past the bar date and the questionnaire, and you look at what they have to -- what they're going to do is have experts.

And all of their experts are going to do, is they're going to sit there and they're going to say, I've reviewed 118,000 questionnaires, which is how many claims there -- supposedly were filed, according to their disclosure statement -- and I'm going to look at those -- those things, and I'm going to assume that that questionnaire has all the evidence available, and in it, that that plaintiff would be able to put in a trial of that case -- because that's what they're estimating, is the outcome of litigation, in the -- under their CMO, or otherwise -- and I will tell the Court how many of those claims are "valid". And then, I will value them.

How are they going to value those claims? They've never told us how they're going to value those claims.

THE COURT: Well, I don't know the answer to that, but that's essentially what the experts do in any estimation

hearing. They don't necessarily look at questionnaires, but they take a look at something -- settlement history, with the case files that go with it.

MR. LOCKWOOD: If Mr. Bernick can make representations to this Court that 75 percent of all the claims are bogus, he doesn't need to have a hundred and eighteen thousand questionnaires presented to some expert so the expert can agree with him.

He's already got some factual expert basis for making those assertions, I assume, unless he's just making them up. If he's got them, he can put them on, we can -- he can prove them.

And if he can persuade -- I mean, this whole business about sick versus non-sick, for example. The fact of the matter is that in virtually every State you can bring a case on an unimpaired claim where you -- where you show exposure to product and you've got some x-rays that show that you've got scarring in your lungs.

The fact that the person is not, in his definition, sick, is, under the Raleigh case, irrelevant. He doesn't get to make up the rules.

THE COURT: The issue, at this point in time, is not whether somebody's sick, or not sick, or whether they have a claim in the State law system.

The issue that I, at some point need to get to, is

what are those claims worth, for purposes of funding a trust.

MR. LOCKWOOD: I agree with that.

THE COURT: Okay, so --

MR. LOCKWOOD: And what I'm --

THE COURT: -- let's figure out --

MR. LOCKWOOD: -- suggesting is that round one -- round one, which may hopefully also be round ten, would be a battle of experts as to how you can do this estimation and whether you in fact need to go through with the procedure of a questionnaire and -- remember, because they've said inconsistent things about the questionnaire and their citation to Robins is misleading.

In Robins the -- the 50-page questionnaire, as opposed to the two-page proof of claim questionnaire, only went out to a very small number of the claimants. It didn't go out to everybody. It was a sort of a sampling process that resulted in that.

THE COURT: Well, if we can work out some discovery plan that makes sense --

UNIDENTIFIED TELEPHONIC MALE ATTORNEY: -- Scott --

THE COURT: I'm not necessarily opposed to the concept of using the questionnaire. I don't know that we need a bar date, and maybe it can go to counsel, if that's an appropriate way to get discovery done.

You folks are going to need discovery, whether I go

through Mr. Bernick's process or the traditional type estimation hearing that you're proposing. So --

MR. LOCKWOOD: I don't know, I mean, Mr. Bernick says he was able to look at 1997 and 2000 claims and reach all kinds of conclusions about their invalidity. He didn't need any discovery to do that.

THE COURT: Well that was --

MR. LOCKWOOD: What does he need --

THE COURT: -- Grace's claims. I mean --

MR. LOCKWOOD: Well, that's why we're here.

THE COURT: Right. But have --

MR. LOCKWOOD: Those --

THE COURT: -- you had access? Or don't you care to have access?

MR. LOCKWOOD: No. I mean, we'd like to have access to it, but I guess what I'm saying is I don't see how he needs any more access to what the claims involve --

THE COURT: Oh, wait.

MR. LOCKWOOD: -- for purposes of this --

THE COURT: No, Mr. Lockwood.

MR. LOCKWOOD: -- estimation.

THE COURT: Just like you said earlier, that discovery's a two-way street and the Federal Rules of Evidence apply both ways. I wholly endorse that concept and if there is additional discovery needed, I assure you, they're going to get

it. Now what it is, I don't know at this process.

I like your concept of requiring you folks to be locked up in my attorney conference room until you hammer out a case management process for estimation. That sounds like a very good idea and if you're not able to, then I guess I'll come up with one on my own.

But, I'm not sure that there is still a fundamental agreement about how it ought to go. I'm not sure Mr. Bernick, frankly, that you need a bar date before we get to this estimation process.

It -- the -- it seems to me that the difficulty with not having either a bar date, or some method by which the debtor knows who is actually asserting claims against it, is that I'm not sure what the estimation process is going to do.

You can certainly take a look at the pre-petition experience and whatever claims have been filed. But, I don't know that that's going to give you the universe of claims.

MR. BERNICK: Yes. I -- it -- I think it's relatively -- it really shouldn't be that difficult.

I don't know that locking us up is going to get there, except that we get along --

THE COURT: I have the only key.

MR. BERNICK: You can see --

(Laughter)

MR. BERNICK: You can see we get along, so well.

(Laughter)

MR. LOCKWOOD: Actually, outside of Court, we do get along, pretty well.

(Laughter)

MR. BERNICK: Well, outside of Court we manage to avoid the dichotomies, unless it's in humor.

(Laughter)

MR. BERNICK: But, I think that the problem with not having a bar date -- and maybe it's a solvable problem -- is literally getting process over the claimants whose information we need in order to --

THE COURT: I'm not concerned about that. It seems to me that there is enough of a history of mass-tort cases, specifically asbestos cases, in which the ballot, at this point in time, is sufficient process to get somebody into this system.

Not to mention, at this point, that I have a gazillion 2019 Statements, so that the debtor ought to have access to information as to who the tort claims are that have been -- that are likely to be filed against it.

MR. BERNICK: Yes. I just --

THE COURT: So, I think in terms of --

MR. BERNICK: Just bear with me for one minute on that, because this gets to be a tricky process. And I think that these people here, that famous 25 percent where I -- with

due respect to counsel, I said let's say it's 25 percent. You've really got to be able, if you're going to do an estimate, you can't just -- A, it's got to be -- it really has to represent these people, in a sound statistical fashion.

THE COURT: But, you know who the pre-petition claim holders are.

MR. BERNICK: We know who they are.

THE COURT: Okay.

MR. BERNICK: We know who they are, but then if you wanted to use it -- if you don't take that snapshot -- and here's the pre-petition people -- and say, would we be content with sending out the claim -- you know, the questionnaires, or whatever it is that we're going to use -- it could be questionnaires, to gather information on a consistent basis, same questions, et cetera, et cetera, then use for purposes of the analysis.

Yes, we could do that if we had assurance A, they all return the questionnaires and B, that they understood that unless they did return the questionnaires, their claims were not going to be allowed --

THE COURT: Well --

MR. BERNICK: -- and it's -- and --

THE COURT: -- doesn't it -- I think for estimation, that's not really the issue. I mean, if I determine --

MR. BERNICK: Let me just --

THE COURT: If I determine what the likely claims are to be filed against the trust, which the debtor would fund --

MR. BERNICK: Yes.

THE COURT: -- isn't that the purpose? I need to know the value of the claims that are likely to be filed against the trust.

MR. BERNICK: Right.

THE COURT: Okay.

MR. BERNICK: But the only way that you can get to the trust, going forward, is to be able to have some basis of saying, here's what the claim's exposure is as time goes forward.

THE COURT: But, it's been done by -- at least ten, maybe more, in Bankruptcy Courts, without proofs of claim before.

MR. BERNICK: No, no, no. Because, that's all because they used --

THE COURT: It's being done in Owens, right now.

MR. BERNICK: That's all because they used this historical extrapolation from settlement.

THE COURT: Well, that's what Mr. Lockwood's going to use.

MR. BERNICK: I know that's what Mr. Lockwood wants.

THE COURT: Okay.

MR. BERNICK: And there's no question, let's just be

very --

THE COURT: Well, surely the debtor knows what it's own non-settlement history is. I mean, you've got the records of the cases that you actually litigated.

MR. BERNICK: No. See that's not -- it's again, Your Honor, apples and oranges. This history is all born of a process that is in the State Court tort system.

THE COURT: But, those are non-judgment creditors.

MR. BERNICK: What?

THE COURT: These -- this creditor group, pre-petition -- pre-filing creditor group that you're talking about are non -- are creditors who have not yet attained judgments.

MR. BERNICK: I understand. But, let me --

THE COURT: Okay. So --

MR. BERNICK: Let's be concrete about it. In a given year, Grace gets 20,000 claims.

THE COURT: Right.

MR. BERNICK: Okay. Notwithstanding what Mr. Lockwood says, since the last, at least the last five years, overwhelmingly, those claims were settled on an inventory basis. They never even make their way onto a docket.

THE COURT: Okay.

MR. BERNICK: Okay. So, if Grace gets 20,000 claims, it then makes arrangements with a bunch of different law firms

that say, I will pay X-number of your claims, or Y-dollars of your claims, if you provide me the following.

And what the plaintiffs are willing to agree to, as part of that inventory deal, in terms of what they provide, varies widely, but by and large it is minimal, and in our view, totally unreliable.

It's not a question of being defrauded. The better word is extorted. We didn't have any choice but to do it.

THE COURT: Now, wait. Not --

MR. BERNICK: No -- I'm sorry.

THE COURT: Both of you stop.

MR. BERNICK: Okay.

THE COURT: We're not talking fraud. We're not talking extortion. We're talking --

MR. BERNICK: That's --

THE COURT: -- a business decision --

MR. BERNICK: It --

THE COURT: -- by an operating company, to settle a claim, rather than going into litigation --

MR. BERNICK: Your Honor, respectfully --

THE COURT: -- end of story.

MR. BERNICK: Respectfully, Your Honor, I would have to tell you that that is not the reality. Yes, it's a business decision.

THE COURT: They didn't agree to the settlements?

MR. BERNICK: Hold on. It is a business decision.

THE COURT: They didn't agree to the settlement?

MR. BERNICK: No. No. They agreed to the --

THE COURT: Okay. End of story.

MR. BERNICK: No. Well, I hate to push you on a little bit, but I really have to.

There was no choice but to enter into those settlements. None whatsoever. You can't litigate 20,000 claims. You can't even litigate 1,000 claims a year.

THE COURT: But, you're asking me to litigate 118,000.

MR. BERNICK: That's because we are -- that's -- that is the basic problem that we have, is that we have no choice in this case, under the law, but to abandon this system. This system does not apply in this Court. It does not.

And what -- the only -- what they're saying that the estimate has to be is, basically take the data that resulted from this system and say, that is the data that is dispositive of now -- of what the claim is worth in this Court. If Your Honor rules that way, that's fine.

We believe that that's completely contrary to the law and would have no -- it would mean that this bankruptcy is meaningless.

There's no question but that, if you take the experience in the tort system, having to pay all that we did,

and you extrapolate it, of course we -- we're out of money. There's no question about that.

Why is it that we filed in the Bankruptcy Court to begin with? It was to escape the system that didn't work. And we'll be able to demonstrate that it didn't work. Because, there's no question about it. We followed the rules, the rules of evidence and the rules of discovery.

We don't have to be content with this process and the data that results from the process, which doesn't answer the questions that we have.

THE COURT: But look. Here's the problem with the bar date. Let's just assume, for a moment, that we set a bar date for pre-petition asbestos creditors. Okay?

MR. BERNICK: Right.

THE COURT: And you get in your -- a perfect world, all 118,000 pre-petition creditors file a claim and traditionally three percent of them are current Mesothelioma victims, you know, another ten percent has some other form of cancer, right down the statistical charts. It all fits perfectly according to everything that -- the published statistics. Just for purposes getting to this analogy. Okay.

I still have a large, in your view, asymptomatic base.

MR. BERNICK: Right.

THE COURT: It still has to be valued. How's it

going to be valued?

MR. BERNICK: Well, the way that it's going to be valued is that we, and now kind of getting into the filters when we say, I don't think it's going to be that hard to get that information, under these questionnaires. They fill out the questionnaires. They've got to fill out questionnaires all the time.

THE COURT: Okay. But, let --

MR. BERNICK: Let's assume that --

THE COURT: Let's stick to the subject.

MR. BERNICK: -- that we got all that. Okay.

We then have to break out the questions. We're going to have questions just like the questions that were asked of the PD claimants. Tell me what particular product you were exposed to and where you were exposed to it? A lot of these people won't be able to do that appropriately.

And they won't be able to identify -- they get washed out right away. They won't even -- they shouldn't even be making claims at all.

A huge number of people, we believe, will be wiped out because the medical data that we would ask to be submitted, to support their claim, doesn't meet the basic requirements that are set forth in the medical screening procedures themselves.

Now, to give you an example, all those non-malignant

claims, they rely on "B" Readers. "B" Readers that are hired by the plaintiffs --

THE COURT: Okay. But, this process that you're talking about, essentially requires what I said earlier, an omnibus objection to claim procedures, whereby I am actually going to be determining the allowance. Not necessarily the value, but the allowance of each specific claim.

Then, we get this database of existing pre-petition claims. That exact database, however, is not Grace's entire pre-petition history, to show what, going forward, the likely future claims against the debtor will be. It may set the value that Grace has to put in to satisfy --

MR. BERNICK: Well, I'm --

THE COURT: -- existing claims.

MR. BERNICK: I'm -- we're on the seventh --

THE COURT: So, it's irrelevant to the estimation process.

MR. BERNICK: No. That's how you get there. The only way to be able to extrapolate to the future is to have a baseline from which you extrapolate.

THE COURT: You do have a baseline. You've got a 20-year history.

MR. BERNICK: No, no. But, the -- you've got a baseline, but the baseline includes a lot of stuff that's not useable in this Court, for purposes of the projection.

But, Your Honor, let's -- like you would --

THE COURT: You know the reason I think it may be useful, Mr. Bernick? It has nothing to do with the rules of evidence, it has to do with the practicality of a plan confirmation process.

The reality is that some of these people will have claims -- in the tort system, will have claims that will sustain a judgment. I mean, it's happened in the past.

MR. BERNICK: Right.

THE COURT: So, it likely will happen in the future, if you ever get back into the tort system.

MR. BERNICK: Your Honor, hear me --

THE COURT: And so the settlement numbers that the debtor, in it's business judgment, whether it views that it was extorted into that process or not, set some parameters within which people who have similar claims in the future may realize that they're not going to be able to get much higher of a distribution through the trust, because that's all the debtor was willing to pay before the bankruptcy hit.

MR. BERNICK: I completely agree with that. I mean, that's why the sequence is, I think, is exactly as I indicated. The issue is not whether there's any -- it's not whether there's no relevance to this. There is some relevance.

But, the issue is, at what point do you apply it. And what we're saying is, that under the rules, you apply these

filters to end up with a population that's a subset of the population that historically has been claiming against the company.

Figure out, then, how many people will be added to it in the future. Maybe you can use an epidemiological curve. Maybe you can use past trends. But, you're working with a smaller population, whose claims do not have a fundamental legal problem.

And that's a very, very important thing to do, is to get to that point. That's the whole reason that we want the questionnaires, is to end up with that sub-population.

How then do we value each of those claims? I think that there probably is relevance from past history, in terms of how you value those claims, those individual claims.

How do you move going forward? You're going to have to do some kind of extrapolation. We don't quarrel with that. What we quarrel with is that, for purposes of establishing the liability, that the rules that apply to liability get thrown out the door. They can't be thrown out the door.

The whole purpose of the bar date is to get information on a claim form, and the information on the claim form then to sort out the wheat from the chaff of people who may in fact have a claim.

We're not saying there aren't people that have claims. There are people that got Mesothelioma from exposure

to Grace asbestos. There are people who got asbestosis. There are people that got lung cancer. What we're trying to do is find out who they are and what subset of the population they are.

You then have a -- isolated them, and you've got to do it in a representative and sound way, and get the data in a sound fashion. You then can go forward to extrapolate, in the future, how many people are going to be coming into the system and you can also develop values on the basis of prior settlement experience.

The only way that -- the only reason that Mr. Lockwood and I disagree is that he wants to include, in this process, this big -- from here, of people who made it through the system before, because it was what it was.

Whereas, what we're saying is, no. Now the rules have to apply, we've got to do a filter to find out the real claimants.

That is why, incidentally, we provided in the plan this class of people. These are the class of people that we expect to pay. These are the people who we want to fund. The way that we differentiate these folks from these folks is through the questionnaires.

THE COURT: Well --

MR. BERNICK: So, we're going to estimate. We're going to estimate using the models. You know, there are things

that can be done.

But, by and large, the big difference is that we don't want to pay people that we're not legally obliged to pay, because of the fact that -- have to pay them simply because they would have gotten paid before. That is the problem that we have to solve in this case.

THE COURT: Well, Mr. Lockwood, it seems to me that I can sort of compromise between these two approaches and get to a legitimate estimation hearing.

It seems to me that if the debtor thinks that it has some value to do a questionnaire, and you know, the form of discovery, I think, is somewhat within the discretion of the Court and we could treat it as though it's a series of interrogatories.

It's not going to be any 50 pages, I assure you. But, coming down to a reasonable type of questionnaire to get some information, so that the debtor's experts can decide what the debtor thinks is a proper valuation, it may have relevance to the committee. The committee may choose to use it for different purposes, I don't know. But, I'm not sure that it hurts to get that step done.

But, I do agree with you, that the appropriate way to do this is through a battle of experts. So, whatever spin the experts put on the questionnaire, maybe they'll be the same spin. Maybe it won't be the same spin. I don't know. But, I

think that should be an expert analysis function that goes forward.

MR. LOCKWOOD: Well, we can certainly try and work with the debtor on the questionnaire, in terms of -- to sample 118,000 people, you don't need to have 118,000 questionnaires. I mean, Mr. Bernick has been tossing around statistical references for extrapolating things, and you don't need 100 percent of the presents, to extrapolate to the futures.

You need whatever the experts would tell you would be a sufficient sample to get -- have it be representative --

THE COURT: Well, maybe --

MR. LOCKWOOD: -- but the one thing I --

THE COURT: I'm not sure it hurts to send it out to all 118,000.

MR. LOCKWOOD: Well, it depends --

THE COURT: In fact --

MR. LOCKWOOD: -- on what the sanctions are for not responding to it.

THE COURT: Well, if there's a bar date, it'll be a --

MR. LOCKWOOD: Well, that's --

THE COURT: -- disallowance of claim.

MR. LOCKWOOD: -- the point.

THE COURT: I mean --

MR. LOCKWOOD: So, then you're basically putting us

in an allowance disallowance position.

And let me just address something on Mr. Bernick's chart, if I might, Your Honor, so that we understand exactly what's going on here.

THE COURT: Well, there may be another way to do it, Mr. Lockwood, without requiring a bar date.

MR. LOCKWOOD: I can't find it.

THE COURT: It -- I take it that most of the 118,000 are represented by counsel.

MR. LOCKWOOD: I assume so, and --

THE COURT: And it seems to me that what we can do, perhaps, is get each counsel to contact each client and make sure that, in fact, that client understands that whatever the estimation numbers are, will be binding on them.

And if they choose to file their own questionnaire, fine. And if they don't, fine. But, there will have to be some representative sample.

Experts can probably predict what that number has to be. And if we don't get it, then I will do some sort of an order that imposes a bar date.

But, it seems to me that if the attorneys are willing to go back to their clients and file something that says my client understands that there is going to be an estimation hearing and that they will be bound, maybe I don't need a bar date.

MR. LOCKWOOD: Well, let me --

MR. BERNICK: Anyway that we can get reliable information, is fine. But, we're real skeptical of the idea that you can just rely upon the claimant. There has to be something issuing from this Court that does create a need for them to respond. If you have dropout from this process, then it starts to create bias issues.

THE COURT: Oh. All right. We -- I think we can handle that issue, because I may not be able to impose something directly on the claimant.

But, as I indicated about the 2019 Statements, I have lots of counsel who are currently subject, as officers to this Court, to my orders. So, I think I can deal through counsel, if need be.

MR. LOCKWOOD: Your Honor --

(Pause)

MR. LOCKWOOD: Your Honor, we should be clear about what the debtor wants this estimation process to entail, from the debtor's side.

This thing over -- this line over here, liability filters, with the boxes. The debtor, without ever actually presenting this to Your Honor for resolution, asserts that there are various legal defenses which they will be able to assert for -- across the board on cases, which will reduce the number to Mr. Bernick's 25 percent.

Some of those legal defenses we could actually tee up, even in advance of an estimation hearing. For example, the proposition that in this estimation process the Bankruptcy Court could determine that people that didn't have a certain level of impairment did not have a State Law right to payment, for example.

Because, what Mr. Bernick really is trying to do here, at the end of the day, in violation frankly, of SGL Carbon, is to use this bankruptcy case as a mechanism for trying to litigate his way out of a problem that he was unable to --

THE COURT: No.

MR. LOCKWOOD: -- litigate his way out of in the torts.

THE COURT: No. Let's stop. All I'm trying to get to is an estimation process. It seems to me that experts may disagree about the appropriate methodology to use. That will be a Daubert issue.

I can determine whether the methodology was appropriate in a simple -- well, I don't know that the --

MR. LOCKWOOD: In --

THE COURT: -- evidence will be simple, but a motion will be simple with respect to Daubert. We can deal with all that down the road.

But, getting the information, at the outset, seems to

me to be a legitimate --

MR. LOCKWOOD: Daubert doesn't speak to the qualifications of an expert who would take a large number of claims, whether it's 118,000, or 10,000 --

THE COURT: No. It speaks to the methodology.

MR. LOCKWOOD: -- (indiscernible) who would review those claims and tell a Court which ones were legally and factually valid.

THE COURT: Right. And so you'll argue that you can't --

MR. LOCKWOOD: There is no Daubert expert of that sort. I mean, that's not --

THE COURT: Well, we'll see.

MR. LOCKWOOD: Because, it's a matter of law.

THE COURT: Well --

MR. LOCKWOOD: Typically speaking, he --

MR. BERNICK: With respect, I think that we're talking a little bit at cross purposes.

We are not going to have experts who will opine as to legal issues. You and I will argue legal issues to the Court. We're not going to have an expert say, gee, in Alabama you can recover for exposure. What we would do is we would argue the legal issues, but the experts would translate our arguments into what claims, or what groups of claims are picked up by the arguments.

A second thing, the Daubert dimension of this, you give the example of, you know, who's impaired, you know, what does impairment mean under State Law. That's one dimension of this, but that's not the principal dimension that will animate this process.

The Daubert issue goes to the reliability of the methodology that was used in gathering medical information. In exactly the same fashion as before Judge Newsome, we litigated, on Daubert grounds, whether dust sampling was an appropriate methodology, and that methodology had been used for all of the property claims, and he found it was not an appropriate methodology.

We're going to litigate on Daubert grounds whether the mass screening is an appropriate methodology, under the ILO standards themselves --

THE COURT: Well, okay. We're going to get to that issue when we get there, for today.

MR. BERNICK: Yes.

THE COURT: Because, I'm ready to move past this. So, finish your remarks --

MR. LOCKWOOD: Well --

THE COURT: -- Mr. Lockwood.

MR. LOCKWOOD: The point I'm trying to make is that, for example, on this methodology, in the State tort system, no State has adopted the ATS Standards for determining what is

impairment.

No State has adopted the proposition that some kind of "B" Reader isn't a good enough kind of "B" Reader. They cite statistics that the plaintiffs have got favored "B" Reader doctors, that some other experts of theirs think over read, by orders of magnitude, x-rays favorable to plaintiffs.

That sort of issue is decided when that expert is tendered to testify in a particular case and the opposing expert is tendered to testify, and the two experts testify.

All these doctors, for example, that they criticize and that they say we need to have a bankruptcy proceeding to deal with, number one, those doctors were first identified as issues in Manville, in the mid-1990's, and not one of them, to my knowledge, has been yet disqualified, from a Federal or a State --

THE COURT: But --

MR. LOCKWOOD: -- Court --

THE COURT: But, regardless --

MR. LOCKWOOD: -- on the grounds that they don't meet Daubert.

THE COURT: But, regardless, the information that the debtor wants, I think, is appropriate for an expert to take a look at.

Whether I'm going to consider it, what value I'll place on it, whether it meets Daubert or not, I think is an

issue down the road.

What the debtor intends to do seems to me, in an estimation process, to be calculated to lead the relevant admissible evidence. And for a discovery on an estimation process, that's all I need.

I am going to direct you two, you and Mr. Bernick, Mr. Lockwood, to work out some mechanism, by which, if we don't have a bar date, because I'm -- for other purposes, I don't really see the need for a bar date. I'm not sure I see the need for one here.

But, I do need to make sure that we have some handle on whatever the appropriate sampling of the questionnaires to go out and get returned is, that we will have a legitimate across the board sample, number one.

And number two, that counsel for all of the present claimants understands that this estimation process is going forward, so if they want to submit that kind of questionnaire and have their own client's medical information included in it, they have the opportunity to do that, because they will be bound by the outcome of the estimation hearing.

So, that, I think, is what we need to do.

MR. LOCKWOOD: Okay. But -- let me just say one thing about this questionnaire process, Your Honor. Actually, two.

First, one of the problems with 118,000, is timing.

While Mr. Bernick facilely suggested these law firms, if they file lawsuits, have at their fingertips the information necessary to answer a questionnaire, that's simply not necessarily true. You're not required --

THE COURT: Look, the trusts have been able to do it, and the pre -- have been able to do it --

MR. LOCKWOOD: The question is --

THE COURT: -- within a matter of --

MR. LOCKWOOD: Yes. The question is time.

THE COURT: -- several months.

MR. LOCKWOOD: How much time?

THE COURT: Okay.

MR. LOCKWOOD: Because --

THE COURT: Well, I think you two can --

MR. LOCKWOOD: -- you know, if you've got 10,000 claimants, or 5,000 claimants that you have to fill out a multi-page questionnaire --

THE COURT: Yes.

MR. LOCKWOOD: -- for each one, that's a whole lot of work and it doesn't get done over night.

THE COURT: Yes.

MR. LOCKWOOD: The second point has to do with what the kinds of things that individual claimants know.

For example, product ID. Typically speaking in tort -- in the tort system of cases, you prove product ID not merely

by the plaintiff's own recollection of where he worked and what he worked with, but co-worker depositions, invoices from the manufacturer showing product was delivered to a site where the worker worked, et cetera.

So, if a claimant is asked, you know, exactly how do you know that you were exposed to Grace asbestos and where, that information might be available not through the claimant, but by the lawyer, when he works up the case --

THE COURT: Well, that can be --

MR. LOCKWOOD: -- and gets --

THE COURT: Wait.

MR. LOCKWOOD: -- discovery from the debtor showing where its products were shipped to.

THE COURT: We're getting way ahead. Because, it seems to me that the debtor has certain information that can go onto the claim form at the outset, which is, what the debtor's products were, where they were delivered, and what period of time they were used in specific locations. And if a claimant doesn't fit within one of those locations, that's --

MR. BERNICK: And Your Honor, these are exactly the kinds of issues -- I actually am looking forward to this sit down session. I only ask that we both have a martini beforehand. And please --

THE COURT: Just one?

(Laughter)

MR. BERNICK: And don't lock the door, because I've now turned 50, and I know Mr. Lockwood's over 50, and we may have to use the facilities during the course of this meeting.

(Laughter)

MR. BERNICK: But, this is exactly the kind of thing that we ought to be able to take up, in the context of that conversation, rather than right now.

THE COURT: All right.

MR. BERNICK: For everything he says, I'm going to have an answer, and it's just not worth it.

THE COURT: In terms of using the facilities, why don't we take a ten-minute break and do just that.

And then I'll come back and we'll -- I'll hear from the other parties before I make final rulings on this, and -- after a ten-minute recess.

(Recess)

MR. BERNICK: Your Honor, if I could raise a -- I'm sorry.

THE COURT: Wait just a minute, Mr. Bernick.

MR. BERNICK: Sure.

THE COURT: Gentlemen, we have a substitute court reporter, since the other one is at lunch. So, when you speak, would you please identify yourself --

MR. BERNICK: Sure.

THE COURT: -- since she will not know who you are.

Okay. Thank you.

MR. BERNICK: I'm David Bernick and I represent the debtors.

Your Honor, just as a preliminary matter, I have said -- I've had a couple of conversations here and I know that the time is shortening. A couple things.

One, we spent all of our time this morning --

THE COURT: Yes.

MR. BERNICK: -- talking about personal injury.

And we're -- the debtors are very, very focused on also talking about moving forward with the traditional property damage claims, as well as the ZAI claims, where there has been no bar date.

And I don't know what it is that Mr. Baena and his colleagues had intended to address, but if we could make sure that we also address those things that are important, in order to keep those processes under way, that would be terrific. Second --

THE COURT: Well, I don't know we're going to get through all of those issues today, so maybe we ought to figure out which ones you want to focus on, because I have my doubts that we'll get done with all that.

MR. BERNICK: Okay. Well, with respect to the traditional property damage claims, we already have the claim forms in and it's simply a question of them really moving

forward to establish, I think, a -- some kind of pre-trial schedule for the estimation that's associated with the traditional property damage claims.

You know, we've made a proposal along those lines. If Mr. Baena doesn't believe we should have the estimation, maybe that's an issue that he can address now.

And then to the extent that we are going to have the estimation, maybe that's something else that we can lock ourselves up in a room to talk about in more detail, which is the timing and substance of what we'd actually do on the pre-trial basis, for the estimation.

For ZAI, the big issue is establishing a bar date, so we can find out -- what that claimant population is.

THE COURT: Well, I don't think I want to go to the ZAI one yet, Mr. Bernick, and it's for this reason. I -- I'm really not yet much involved, even in the issue of the science trial.

And I thought the whole purpose for going through the science trial was to see whether or not a class proof of claim, if any claim, is appropriate. Whether a class proof of claim would be the way to go, as opposed to having individual claimants file.

So, if I set a bar date, and then notify -- I'm not even sure who we'll notify, at this point in time, because I haven't gotten through that evidentiary premise.

But, it seems to me that that issue ought to wait until at least the science trial is decided and we see A, whether there is some scientific support for the fact that there's property damage, at all, and B, if there is, whether it should be adjudicated in a class format.

MR. BERNICK: Yes. Here's the problem. And the reason that we're so focused on this is that right now, if Your Honor's focused on, you know, what does it take to get to a consensual plan until we have a claimant population, we have no clue.

They will say that there are a million people, a million homes out there. We'll say there's 100,000. And you've got an order of magnitude difference, just in what the size of the claimant population is.

We may find out that when it comes to people who are going to step forward and actually make a claim that there are very, very few of them. We think that that's exactly what's going to happen.

But, until you fix the population -- the number of claimants, it is almost impossible to talk about ZAI, unless Your Honor rules, that from a scientific point of view, the claims are going nowhere.

Instead of -- we thought about this and we said, well, why don't we ask that the Court rule on that issue and then we can go ahead, if we don't prevail, or if we prevail in

part, to then craft a bar date in the claim form. And the problem then is that more time passes before we find out who is a claimant.

So, what we thought we would do is ask for the bar date, but instead of having a detailed claim form like we were asking for before, we have a much simpler claim form that doesn't pose, in a sense, the risk of people going up and being required to scoop out stuff from their attic. So, we at least would get a claimant population.

We then would delay sending out the questionnaire, until Your Honor determined what you wanted to do, in terms of getting information from people and the like, what you thought the science trial was going to yield.

But, at least that way we're not holding off on advancing the cause, to find out this critical piece. We're going to need to know, at the end of the day, who the people are who are making a claim to begin with. Even if there's a -- if a class certified, we wouldn't know how to resolve that class, or we wouldn't know how to resolve the case, until we knew who was actually going to make a claim.

So, we really need to know who's going to make a claim. So, that's exactly what we've done, is we've asked for a bar date, we've watered down the claim form, and it's very, very urgent, from our point of view, that we get this critical piece of data put in place. Because, otherwise, I don't know

how we resolve the ZAI claim consensually.

THE COURT: Well, I don't know how, until we get the notice out -- I thought the purpose for the science trial was to find out whether there was sufficient scientific evidence that there is actually going to be some form of property damage and, therefore, to craft a claim form around that outcome.

MR. BERNICK: Yes.

THE COURT: I don't know how you craft a claim form until that issue's determined, unless you want to say, assume, for -- without deciding right now, that there is damage to your home if you were subject to ZAI, then file a claim.

MR. BERNICK: Well -- and most claim forms -- and I think this is -- I believe -- I know this is accurate. Most claim forms -- most notices don't -- are neutral. And they're required to be neutral.

You -- it simply says, do you have this product in your house and if you do, are you making a claim for it. And they're not required to know the nature of the claim, or anything. They're just told, you know, if you have a claim, here it is.

We might even be able to craft something that says, it is claimed that this product does X, or Y, or Z, and provided that it's not argumentative, it's simply informational well, that's something else that -- there's no reason why we can't work that out.

But, the criticality of being able to find out who's going to make a claim is so overwhelming here, because of the inability to know what the population is that we're dealing with, that we think it's -- is that critical.

That we're -- we prepared -- be prepared to spend the time to craft the notice. We just want to get it out the door in a way that enables us to move forward and identify the population. If you do it by way of class, then you're guaranteed to delay understanding that critical piece of information until later. It's really the cart before the horse.

Let's find -- even in the First -- there's a New Jersey case, First Interregional Equity or something like that, where they ultimately decided to use a claim form that was done in the context of having established a bar date -- a class claim form, then you establish a bar date, and having the people come in. And at least there they knew that there were 2,000 people who actually made a claim.

So, you know, that's the kind of information that we need. But, maybe if that could be addressed.

Second point is I had a brief conversation with Mr. Lockwood about, you know, where are things really going on Monday, and the like, and I suppose if we don't finish this afternoon, talking about just the things that we've talked about, that'll spill over.

But, beyond that the two things that were up for Monday were the exclusivity issue and then also the confirmation procedures. And I think that we at least don't see an urgency, right now, to resolve the confirmation procedures.

With respect to exclusivity, I think there's only been one objection, which comes from my dear friends over here representing the futures representative. I don't know that it makes sense, if we finish other things, to bring everybody back on Monday for that, as an in-person hearing.

Although, obviously, we're prepared to come back if that makes sense.

THE COURT: Well --

MR. BERNICK: And all that really means is that if we can vote --

THE COURT: I don't think we need to get to the confirmation procedures. I'm having enough trouble getting to the disclosure statement procedures, so --

(Laughter)

MR. BERNICK: Right.

THE COURT: -- let's knock them down one at a time.

So, the confirmation procedures, at this point, I think, can be deferred.

If you want to talk about the objection to exclusivity, today, I've read the stuff, I'll hear it, if

that's what you want to do. But, I really do think it would be a good idea for me to let you folks out early, although I understand they're now saying that this four to eight inches here, and twelve in Philadelphia, may not start until early in the morning. But, it seems to be a moving --

MR. BERNICK: Well, I think we still want to get out --

(Laughter)

MR. BERNICK: We still want to get out of here.

(Laughter)

THE COURT: You don't want to stay and see the Steeler game here?

MR. BERNICK: I didn't listen to the weather.

(Laughter)

THE COURT: That's what I mean.

MR. BERNICK: But, let's -- on this -- there's some options. I think we just have to stay on course and I think that if we can focus on those two groups of people, that would be terrific.

THE COURT: All right. Mr. Kruger?

MR. KRUGER: Lewis Kruger, for the Official Unsecured Creditor's Committee. Your Honor, while this morning Mr. Bernick and Mr. Lockwood appeared to dominate the conversation about bar dates, and questionnaires, and the like, the reality of it is that our clients, our commercial creditors are the

ones who'll be most impacted by what may be the end result of an estimation process here.

We find that we're obliged to file proofs of claim in this Court. We have to demonstrate that W. R. Grace owes us money, either for money loaned, for goods and services pursuant to contracts, or otherwise. We need to identify why they owe us that money, how much they owe us, and the like.

It doesn't strike me as inappropriate for there to be a bar date for those who claim any claim against W. R. Grace, and it doesn't strike me as inappropriate for them, to me, to demonstrate why they believe they have a claim compensable by W. R. Grace.

That's not to say that ultimately the Court will determine what is indeed an appropriate level of information for them to provide, or whether or not the claims they assert are indeed compensable. But, it seems to me, as a threshold matter, particularly since all creditors are entitled to object to other creditor claims, that we have a standard to maintain, which is that there ought to be a bar date, there ought to be information provided, there ought to be questionnaires.

People should not really be able to -- sort of lie back in the weeds and say, some estimation process will take care of me.

We're entitled to know who are the creditors, who are the claimants, what is the nature of their claim, and why they

believe that they have some compensable injury which needs to be compensated by W. R. Grace.

THE COURT: Okay. Well, I appreciate that view point. It does seem to me, however, that 524 really does not require proofs of claim to be filed by tort claimants. And I think there is some reason for that.

Number one, not everyone knows that they have an existing claim, at the time. That's why they can be put into a future demand category. And number two, it doesn't necessarily make sense to look at an estimation process for purposes of allowance of the claim, in the pre-confirmation phase, at least if there's a consensual plan.

It seems to me that we can work out some kind of compromise that still provides the information that you are requesting, which I think is legitimate, i.e. who are the tort claims, who -- or at least in global terms, who are the tort claimants, who will be coming forward at a level that the debtor is going to have to recognize in the trust, and what does that do to the underlying unsecured creditor distribution.

I think, at this stage, to get a plan on the table, that's really all I need. Now, to get through confirmation, I don't know, maybe something more will be needed. But, I think at this stage, if we can at least estimate those numbers, we'll get a lot closer toward a consensual plan from all groups. So --

MR. KRUGER: Maybe.

THE COURT: -- I want to move forward on the estimation side. I'm not saying that at some point I don't think a bar date might be appropriate, I'm just not sure we need it here, now.

MR. KRUGER: But, for those who certainly believe they had claims prior to the commencement of the Grace proceeding, now more than three years ago, since that, I don't understand any reason why they should not be obliged to file claims.

THE COURT: Well --

MR. KRUGER: They did assert a claim. Why are they not entitled to file a claim, like everybody else does?

And I don't know that it makes a difference that you're a tort claimant. There's nothing special about being a tort claimant. You're just another kind of creditor of this estate. And other creditors are entitled to look at your claim, and have a view as to whether or not that claim is an appropriate one to be compensated by Grace.

THE COURT: Well, I'm not sure that's the case, because of the fact that the claims are channeled to the trust and once the trust is --

MR. KRUGER: Futures may be.

THE COURT: Well, the -- the presents can be too.

MR. KRUGER: Possibly.

THE COURT: And to the extent that the presents are channeled to the trust, they essentially waive the claim against the debtor's estate, in favor of what the trust is going to pay them.

MR. KRUGER: Well, but that -- but, Your Honor, that's an illusion. Those funds come from the debtor's estate, so therefore creditors -- other creditors are entitled to look to see --

THE COURT: I don't --

MR. KRUGER: -- whether the funds that are going into that trust are appropriate.

THE COURT: I don't think the Court's view that as an illusion. I think they view it as a statutory requirement under 524.

But, I agree with you with your ultimate conclusion, which is creditors have the right to determine whether the distributions are fair and reasonable with -- coming either from the -- that the debtor would put into the trust, on the one hand, versus what the debtor would be paying to other creditors whose claims don't go into the trust, on the other.

But, I think the first piece of that is the estimation process.

MR. KRUGER: And a questionnaire of some kind.

THE COURT: Well, yes. I'm -- I think the questionnaire's a good idea, but it's not going to be 50 pages.

MR. KRUGER: Okay. That may be.

THE COURT: In fact, it's probably not going to be ten pages, so --

(Laughter)

UNIDENTIFIED MALE ATTORNEY: How long was Mr. Baena's questionnaire?

THE COURT: I don't know.

MR. BAENA: How long was my question?

UNIDENTIFIED MALE ATTORNEY: Yes.

UNIDENTIFIED MALE ATTORNEY: Your questionnaire.

UNIDENTIFIED MALE ATTORNEY: Your questionnaire.

UNIDENTIFIED MALE ATTORNEY: How many pages?

MR. BAENA: It was very long.

(Laughter)

MR. BAENA: And most of it was unnecessary.

(Laughter)

THE COURT: Okay. You --

MR. BAENA: I think it was six or seven pages.

THE COURT: But, does anybody -- before I turn to the issue of the property damage and the ZAI, does anybody else wish to be heard on the nature of the personal injury estimation hearing? Mr. Baena?

MR. BAENA: Judge, the only thing I would say in that regard is, and I think Mr. Kruger alluded to it in respect to his constituency -- forgive me, Scott Baena, on behalf of the

Property Damage Committee -- is that, for at least two reasons, we believe we need to be involved in this process that defines the contours of the estimation.

The first is, I think it's always amusing to be in the same room with Mr. Lockwood and Mr. Bernick, particularly when there's no Judge imposing any form of good conduct upon them --

UNIDENTIFIED MALE ATTORNEY: I'm going to delegate that job to somebody else in my firm.

(Laughter)

MR. BAENA: And secondly, of course, as Mr. Kruger alludes to, the value of those claims has a profound affect --

THE COURT: Yes.

MR. BAENA: -- on every constituency, and we're all going to be involved in -- on one side or the other, of that process.

So, I'm not asking to be locked in the same room, but I am asking that we have a point of entry --

THE COURT: Oh, sure.

MR. BAENA: -- before the hearing, so it's not a fete accompli.

THE COURT: Oh, I didn't mean to suggest that it wouldn't be circulated to everybody else for comments, Mr. Baena.

But, I think that the two critical groups who will --

who will likely be presenting evidence, I mean, maybe others will too, but the likely two groups that will be presenting evidence -- or three, possibly, will be the debtor, the asbestos committee, and the futures rep.

And yes, if anybody else who's a recognized committee, you know, has some issue, you're entitled to be heard, and I'd certainly hear it, and, yes, I would agree that your -- you have to participate at some level in the process, setting up that estimation process.

But, I think the lion's share of the work should come from Mr. Bernick, Mr. Lockwood, and somebody representing the futures rep, because I think they will be taking the lead.

Am I incorrect? Does somebody else expect, at this point, to be presenting major substantive evidence, at the estimation hearing, on the personal injury tort liability and numbers. Okay.

So, yes, I expect the three of -- I didn't address the futures rep, because they've been over there very silent, but actually, I do include the futures rep in that process. I think the three of them need to take that -- to start that, getting an order together, and then circulate it to everyone, before it's presented to me.

If there are areas of disagreement, I'll hear those areas of disagreement. In all probability there aren't likely to be. Okay. Yes. Good afternoon.

MS. WARREN: Good afternoon, Your Honor. Mary Warren, for London Market Insurers.

Your Honor, I wanted to draw your attention, briefly, to something, before you move on to other subjects, in connection with the estimation procedures, or hearing.

Certain insurers of Grace, in this matter, interposed a limited objection to estimation motion and the case management motion, on the following grounds.

The thrust of our objection is to make sure that insurance neutrality is enforced, in connection with any estimation that emerges from the proceedings that the parties are going to work on together. Likewise, if anything is litigated, pursuant to the case management procedures, we want to make sure that insurance neutrality is enforced in that context as well.

The certain insurers generally support what the debtors are trying to do here, in terms of their plan. However, Mr. Bernick and Mr. Lockwood told you a story earlier today, about the Babcock proceedings, in which the plan started out as being somewhat along the lines of what the debtors are proposing now.

Later on, that plan was withdrawn and became an assignment of insurance rights plan, a purported adjudication of insurance rights plan, and that was done despite the debtors best intentions earlier on in the proceeding.

We make no aspersions on the debtor's theories here, but the same thing could happen. And, therefore, the reason why we ask now, for insurance neutrality to be enforced, is because Your Honor seems to be contemplating that estimation will happen early on, will help set the framework for what happens later, who votes, et cetera.

We want to make sure that insurance neutrality language is included in any estimation order, any case management proceeding order --

THE COURT: I don't know about that. I don't know what the issues are, at this point in time. I don't know whether the debtor's going to propose a plan that does not impair insurance company rights, if in fact that's the kind of plan that we get to, ultimately.

The one thing that Combustion Engineering did do, is state what language has to be put in for insurance neutrality. It's not an issue I ever have to look at again. I'm going to use that language, period, end of story. So, if it's to be an insurance neutral plan, that language worked, that's the language we're going to use in this and every other case that has an insurance neutrality plan, until the Third Circuit or the Supreme Court say no. So, okay.

But, I don't know what the context of the plan will be yet, so if you think you have an interest in participating in the estimation, then just simply join in that process.

MS. WARREN: Well, Your Honor, an alternative to that is to make sure that we are protected by having -- and exactly what Your Honor has in mind, is what we would propose here, is having that Combustion Engineering approved language included, by order of Your Honor, in any estimation order, any case management order that might emerge.

And Your Honor's -- is correct, the plan might evolve, but from what I'm hearing, estimation might evolve before the final plan is put in place.

THE COURT: I have no idea how insurance neutrality is somehow impacted by the estimation of the tort liability.

MS. WARREN: Well, Your Honor, let's say an estimation number is agreed -- let's say an aggregate number --

THE COURT: Yes.

MS. WARREN: -- is arrived at. You don't know whether later on, the debtor will, pursuant to a different plan, assert that that creates a UNR kind of result against insurers.

THE COURT: The only way to protect yourself is to join in the estimation process. I mean, at this stage of the game, that's the only thing I can tell you to do, so join in the estimation process.

In other cases I haven't had to go through it, so I haven't had to worry about binding the insurance companies. I do have to go through it in this case, so join.

If you're concerned about the consequences, join in the process.

MS. WARREN: Your Honor, I understand what you're saying, but when there's an opportunity to insert protective language in an estimation order, that we know the Third Circuit has already approved --

THE COURT: If the other parties are willing to do it, it's fine with me. But, I don't know, at this point, that there is consensus on insurance neutrality in this plan. If there is, fine. If there isn't, join in the process.

I am not prejudging plan confirmation issues and insurance neutrality is definitely a plan confirmation issue.

To the best of my recollection, it hasn't even come up in this case until now.

MR. BERNICK: It's very simple. Combustion Engineering was prepared to agree to insurance neutrality in the case. And the only issue was, what did neutrality mean? How did you word it, what impact it would have?

That is not the case in this case. We have not made a commitment to be insurance neutral here. I am -- as a consequence, I would endorse what Your Honor said, which is that if they want to participate, they can participate.

THE COURT: If --

MR. BAENA: Your Honor --

THE COURT: Yes, Mr. --

MR. BAENA: If I may, Scott Baena, on behalf of the property damage -- I -- by saying they can participate, obviously we weren't prepared to argue this today, we wouldn't concede their standing to participate, at this moment in time. And I hope by your direction -- or suggestion, perhaps is a better way to put it -- you're not conceding, or directing that they do have.

THE COURT: Mr. Baena, I haven't heard a word in this case, to the best of my recollection, about insurance neutrality, until this proceeding happened today. I'm not prepared to make any rulings on insurance neutrality, or insurance standing.

MR. BAENA: Right.

THE COURT: What I'm suggesting is that if they think they're going to be prejudiced, then they better take appropriate steps, whatever they are, to join in the process, because I'm not going to enforce an insurance neutrality provision.

That was something that in Combustion was somewhat agreed to, and in other cases has come up as an -- a representation by the debtors that the plans were intended to be insurance neutral.

When the debtor said that the plans are intended to be insurance neutral, so that the insurers have no claims against the debtor and are not entitled to vote, then I'm

willing to make sure that the plan is "insurance neutral."

But, I don't think I have that in this case, so I'm not prejudging plan issues and if you think you need to protect yourself in some other way, all I'm suggesting is that you take whatever steps you think you need to take.

MS. WARREN: Well, Your Honor, respectfully, I think we're hearing exactly why it would be useful to get this language in the plan early. The debtors have just told you they're not going to agree to it. Mr. Baena has just told you that we might not have standing.

So, we're already getting caught between a rock and a hard place, and one way to enforce insurance neutrality is to start enforcing it now.

THE COURT: But, I'm -- I'm not in a position of enforcing it unless the plan says, this is going to be an insurance neutral plan, in which case I will do my best to write an order that makes sure that the plan is, in fact, carrying out insurance neutrality.

But, if the debtor isn't committing not to change some rights or obligations of the insurance company, I'm not going to give an insurance neutral plan. That may give you voting rights that you don't have in other cases, so if that's the case, exercise them.

But, I'm not prejudging plan issues. I'm getting to one thing and one thing only, and that's the estimation of the

personal injury tort liability, period. And possibly value, not just the liability, but the value.

MS. WARREN: And we'd like to make sure that that estimation does not veer into areas that I believe Your Honor has opined, in other cases, that you don't want to get into.

My understanding is that you don't consider this a proper forum to determine State Law coverage issues.

THE COURT: There aren't going to be any coverage issues in the estimation hearing. The debtor may very well say this is what the level of my insurance assets are, and this is how I propose to use them. I mean, that's something that may happen.

But, in terms of State Law coverage, I'm not getting into insurance issues in this hearing. If I'm asked to in some other context, I'll deal with it then, but that's not the purpose of this estimation hearing.

MR. BERNICK: I think in order to maybe cut to the chase, I think what counsel's concerned with is that the record would then be usable in connection with some subsequent insurance action. Obviously, the issue of insurance coverage is not, from our point of view, going to be teed up in the estimation, but the record is going to be whatever it's going to be.

THE COURT: It is.

MR. BERNICK: And we are not agreeing that the record

cannot later be used for whatever purpose the law dictates.

THE COURT: Then, you know, if that's the case, in all probability, the insurers may have standing and they may participate, because there will be some prejudice to the -- potential -- not actual prejudice, to the insurer's rights.

So, all I can tell you is take whatever steps you think are appropriate, but I'm not going to write insurance neutrality into a plan that doesn't provide for it.

MS. WARREN: Well, Your Honor, we will work with the debtors to see if we can reach any agreement. If not, you can probably expect us -- to see us quite a bit. Thank you.

THE COURT: Okay. All right. Anybody else? Okay. Yes?

MR. CHEHI: Your Honor, Mark Chehi, of Skadden Arps, for Sealed Air, on this very specific point.

And that is it goes to the proof of claim issue raised by committee counsel. I think we have a concern, or are just going to reserve rights and perhaps make a presentation to the Court at a later date on, perhaps, the need for a proof of claim process to ensure that we've identified all the claimants and they're all getting adequate notice of the proceedings, for purposes of a plan confirmation, objection, and voting, and the like.

And that's important to us and to other parties who would be protected by the 524(g) and 105 injunctions, to make

sure that they've had their opportunity, have notice of those injunctions issuing, and take objection before they issue.

THE COURT: Okay. Well, some process is going to have to be employed for that end, Mr. Chehi, and whether it's a bar date, or something on the ballots, if in fact they vote, is a different issue.

So, I'm not in the process of disallowing claims, if I don't have a ballot process. I'm probably also in the position of permitting votes, if I don't have some disallowance of claims. So, it's something that we'll have to address later.

MR. CHEHI: And our concern, again, is just identifying the folks who are entitled to vote and have an opportunity to be heard among the asbestos claimants creditor group, to the extent they have -- there's not been a bar date notice, it's hard to determine exactly who they all are.

THE COURT: It's been done in every other asbestos case that's been pending in the United States since Manville, so I don't think it's going to be an issue for this one.

MR. CHEHI: Okay. Thank you, Your Honor.

THE COURT: We'll figure out the notice. Thank you. All right. Anybody else on the personal injury issue? Okay.

Then, the futures rep, the asbestos committee, and the debtor, are to meet and draft a case management order for estimation of personal injury actions -- personal injury

matters -- and then, circulate it to all -- I'll just call them parties in interest, which include the insurance companies.

Can we get to this issue in the February omnibus? Can you folks get something together in time to circulate it prior to the February omnibus, so that I can deal with it then?

MR. LOCKWOOD: We can certainly strive to do that, Your Honor, and I don't see any reason, right now, why we couldn't succeed.

THE COURT: All right. The debtor's to put it on the agenda for the February omnibus, if possible, and the March omnibus at the -- at the very latest.

I think that should give you enough flexibility to get everybody together, if it's agreed upon by all parties in interest, then you can file -- put it into the appropriate evidentiary -- or, pardon me, hearing binder, and give me a CNO and I'll sign it, in all probability. I obviously reserve the right to make sure that I agree with the dates and can schedule the hearings on my own calendar, but in all probability, I'll agree to the substance of it.

If you can't agree, then it should go forward along the normal objection process period, so that I have contested matters set for that omnibus, which is why I don't know if you'll make the February hearing.

All right. Mr. Baena, on the property damage?

(Pause)

MR. BAENA: Judge, before I get into the estimation issues, if I may, I -- in -- for 200 years I think Courts entered orders and people obeyed them, but in this case the Court orders something and then we argue about it.

And about two and a half hours ago, I think you ordered that asbestos claimants are going to have a right to vote, under this plan. And then we argued again, well Mr. Lockwood and Mr. Bernick argued again.

I just want to ensure that we're past that issue, nothing happened in the course of that argument that changed the Court's ruling.

THE COURT: Well, I don't know where we stand on the issue of the right to vote. I think what we're doing is looking at an estimation hearing, and the outcome of that estimation hearing will probably govern whether there is or is not impairment in the financial sense, that I was getting to earlier.

MR. BAENA: Well, Judge, as Mr. Lockwood pointed out, there are two sides of the voting issue. We've got the 1126 side and, frankly, I think the issue that you just framed and your discussion earlier today, really went to the 1126 issue.

But, then we also have the 524(g) voting issue, and I don't think it's affected by any of the processes that we're talking about. And I also don't think it's really highly debatable about the fact that 524(g) gives people who are going

to have their claims channeled to this trust a right to vote.

If the Court isn't past that, I would like, before I discuss estimation, to at least address those issues, if you're taking the matter under advisement.

MR. BERNICK: Your Honor, if -- as a point of process, a -- if we are now going back to revisit those issues, I'm happy to do it. But, we are then probably not going to get to any of the remaining issues.

Mr. Baena's clients are in a fundamentally different position, with respect to impairment, than are the personal injury client. And I'm happy to take that up.

But, to have more than one counsel now stand up and address what 524(g) means, what 1126(1) means, or (f) means, or whatever it is, means, is basically going over exactly the same ground. And we think it's critical today, that we reach some of these other issues.

THE COURT: Well, Mr. Baena, with respect to whether or not the personal injury claimants can vote, how is that relevant to your constituency?

MR. BAENA: Judge, we also objected to the confirmability of the plan, on the grounds that it stripped all asbestos claimants, be they personal injury or property damage claimants, from the right to vote. That plan doesn't anticipate our vote either.

THE COURT: Okay. Well, on that issue, I think I'd

like to hear from you. All I was addressing today, the -- earlier, when Mr. Lockwood and Mr. Bernick were arguing, was personal injury. I took Mr. Bernick at his word that we are segregating these issues according to the three categories that he put on the chart.

MR. BAENA: I don't believe, Judge, that --

MR. LOCKWOOD: Excuse me, Scott. Your Honor, I had thought that basically we pretermitted the voting issue until after --

THE COURT: We did.

MR. LOCKWOOD: -- the estimation took place, such that when the debtor then came back with an idea of circulating a disclosure statement, we would, in effect, revisit it.

THE COURT: We did, as to the personal injury.

MR. LOCKWOOD: If that's the case, then Mr. Baena could revisit it then, as well, because Your Honor is not in fact taking it under advisement, in the sense that he asked the question.

THE COURT: I'm not taking that issue under advisement, but I understood the remarks to be related to the personal injury component, not to the property damage component. I'm happy to have that same issue deferred, if in fact we're going to do an estimation hearing on property damage, or some objection to claim process on property damage.

MR. BAENA: I'm happy to defer it, as well, Your

Honor. But, let me just make sure that there's no misapprehension. Property damage is vitally interested. It has raised the same issue, as an overarching objection to confirmation, in respect of its class, under the plan --

THE COURT: All right.

MR. BAENA: -- which is also denied the right to vote.

THE COURT: Okay. I am not taking that under advisement. I will simply ask the debtor, once we get through the estimation processes, or objection to claim processes, whichever they are, to put that issue back on the agenda, and I'll deal with it then.

MR. BAENA: That's fine. I appreciate that, Judge. And by that issue, Judge -- just forgive me. By that issue, again, it's both forms of voting, under 1126 and 524(g)?

THE COURT: Yes. All vote -- any vote.

MR. BAENA: Very well, Judge, then, I -- I'd like to move then to the estimation of traditional property damage claims, if I can start there, and then I'll go to ZAI.

THE COURT: All right.

MR. BAENA: Before I spend 30 or 40 minutes talking about a process for estimation, first let me disabuse any misapprehension on the subject.

While we have complained in the past about the process of estimation, in the case of property damage, we lost

that argument and we recognized it, we complained about the proof of claim form, we lost that argument, and we participated in the process of formulating a perfect claim form, and that has gone out.

And at this point in time, we understand it to be beyond our ability to object to the notion of an estimation process. You've made it abundantly clear we're going forward, we're estimating property damage.

And we have moved from that position. That's where we start. We assume that that process is going to be undertaken.

And I -- and what I find particularly surprising about Mr. Bernick asking whether or not we were opposing estimation, is because not only did we come to understand that the Court was going to require it, so we need to just accept that fact, but in our response to the debtor's motion on estimation, we actually tried to help the Court develop the process.

And I don't appreciate the fact that, not only is our effort to improve the process not being recognized, but the suggestion is that that effort somehow may be even characterized as one which would preclude the process from going forward.

Judge, we're not going to obstruct that process. We're trying, for one very important reason, to be helpful in

constructing this process. And that reason is that, unlike personal injury, it's never been done before, in respect to property damage.

Everything we may read about estimation in the case law, affecting asbestos cases, has nothing to do, in large part, with property damage. We are painting on a clean easel, for property damage. And the reason for that is easy to explain.

First of all, in terms of 524(g) cases, there's only been two that have materially implicated property damage claims that have been confirmed. And most importantly, in those cases there was a consensual plan and the parties were able to resolve, consensually, the extent of the asbestos liabilities, personal injury as well as property damage.

And so, what we have here is the first time that we're approaching it on a non-consensual basis and, more importantly not the last. Because, as you well know, we're going to probably address this same issue, if we're unsuccessful in amicable resolutions in USG. We're going to have that problem there. Property damage is implicated in the Federal-Mogul case, that I'm not involved in that case, but it may affect the outcome in that case.

So, we're real anxious about this process, not to obstruct it, but to ensure that what we create in the course of this case is a useable process, a process that's efficient, and

a process that can be replicated again, in future cases.

And so, we really spent a lot of time trying, in our papers, to point out what was wrong with the process that the debtor was advocating. And when I say what's wrong with what the debtor was advocating, that may be a poor choice of words. Because, the problem we had with the debtor -- the debtor's motion for estimation of PD, is that is was like some cosmic sweep of procedures that were only laid out as we complained.

In a nutshell, there is no process that they describe in their papers for the estimation of property damage. We don't even have these pictures in these papers, that might have been a little bit helpful. All it says is -- there are really three pieces to this, according to the debtor.

The first piece is already underway. The Court approved the gateway objection order, which permitted the debtor to tee up, without having to bring on objections on any other substantive basis, these so-called gateway objections. And there was a finite number of them. Inadequate proof of claim form, statute of limitations was in the -- and things of that sort.

And the Court created a process that required them to give a notice of their intention to bring on these gateway objections. The Court said that we'd give them relief from the local rule that limited them to doing more than 150 of those kinds of objections in a single pleading. And the Court gave

them relief from the requirement that they put all their substantive objections up front.

And when they asked for that permission, they did so on the grounds that, they claim, some of the proof of claims forms are so materially deficient they can't even figure out what the substantive objections are until they get some more basic information. And that process is underway.

And that's a process I would point out, that obviously very much implicates property damage claimants. Those notices are being sent to them and my expectation, by the virtue of the Court's order is, if people don't comply they will file objections and those objections will be directed to those property damage claimants that failed to comply. They're very much in that process.

On the other end, the third piece -- I'm going to leave the second piece for last -- the third piece of their estimation process, and I use that word generously, the third piece is that they'll hire an expert, and we'll hire an expert, and those experts will each file a report, and then we'll have a hearing.

Well, that's it. That's all it says, Judge. I promise you I'm not embellishing, I'm not making it up, that's what they say. What they're going to file a report on is, presumably, the value of the remaining claims. But, you know, the detail that's missing sort of makes implications, as well.

And as we read this very ill-defined program, it sounded like what they really wanted to do was sort of like reduce -- find as many processes as possible to reduce the number of property damage claims, and then lets put a value on the ones that remain, just for purposes of feasibility, not for allowance.

And the values of -- that they're going to associate with those claims, are going to relate to the remaining substantive defenses that they have to those claims.

And so we say, well how are they going to put on this proof? And we surmise that they'll put on a lawyer, or somebody to say, you know all these claims -- I've reviewed them, there's a finite amount of them, and this number of claims is subject to this defense, and this number of claims is subject to that defense, and I think those defenses are overwhelmingly good, on behalf of the debtor, and there's no value to those claims.

Well, that's not an estimation process. And so we said, you know, let's revisit how this is done.

Now, the second piece is the piece that I don't understand at all, to be honest with you. And if we had the opportunity, in Delaware, to file an unlimited number of objections, responses, and replies, I might get the answer to it, because it sort of leaks out in Grace's papers.

As they describe the second part, they're going to

use common issue trials, they're going to use summary judgment proceedings, they're going to use -- generically use litigation devices, but it doesn't really describe, altogether, what those issues are.

The one example that they use is the worst example they could have used, which was the statute of limitations, because we know how individualized those determinations ordinarily are.

And they don't really tell us much about how that process works, but what they do implicate in their most recent response is, that's not a process the claimants are going to be involved in. That's a process that will probably be somebody representing their interests, maybe a committee.

And what we intend to do, they suggest by implication in their papers, is we're going to take those rulings that we get out of these processes, and we're going to try to apply them by orders to show cause, or by way of the Court just taking notice of the law of the case, to individual claims, to get rid of them.

It's not a process. That's not a process. That's not even a process they've been bold enough to imply, or imply could be used in respect to personal injury.

Now, a couple of observations. First, if you believe everything that Mr. Bernick's papers say about property damage claims, I think there's like just a couple of them that are

going to remain, after he gets finished with the gateway objections, and this middle piece. And so why it becomes so difficult to deal with those remaining claims, as we would ordinarily take care of claims in the bankruptcy process, begins to escape. So, I guess it's a bit, adult in suspenders, or maybe he's not so confident about the outcome of all of his objections.

In any event, whatever's left at the end of the day has to be processed by Your Honor, for purposes of value. And the first thought that occurs to me, Judge, is we use too much shorthand in all these cases, and maybe we're doing a grave disservice to you by using shorthand.

We talk about property damage claims like everybody knows it to be a household word. What is a property damage claim? Well, if we -- we -- if we accept the debtor's definition, and this is very meaningful in the terms of how we create a process -- under the debtor's glossary, which accompanies their plan documents, they describe a property damage claim as any claim arising in the nature of, or a sounding in tort, or under contract, warranty, guarantee, contribution, joint and several liabilities, subrogation, reimbursement, or indemnity, or any other theory of law, equity, or admiralty.

And, in fact, if you look at the plans that were confirmed in other cases, well, they use litanies like that,

but they go on to actually describe the kinds of causes of action that property damage claimants have historically brought, and it's meaningful.

In some jurisdictions, you can sue for the mere installation of the asbestos product. Not many jurisdictions, but in some. In more -- more often it's the case that the claims are brought on fraud, trespass, continuing nuisance, regular nuisance, conspiracy, concert of action, negligence, strict liability, restitution, indemnification, contribution, guarantee, breach of warranty, or for fitness and merchantability. It's a wide range of claims that they seek to get a discharge from in the course of this bankruptcy, and channel to a trust.

And the reason this is significant, Judge, is because when they say, oh, we're going to blow through a lot of claims on statute of limitations, just try to conceive of what the process is like. Because, what statute of limitations are we talking about? What jurisdiction are we talking about? What are the rules of discovery in that jurisdiction?

And the analysis could entail tens of thousands, if not hundreds of thousands of decisions that you'll have to make in respect of claims -- property damage claims, because of the wide variety of claims that those claimants could bring.

Our view is that common issue, just as the debtor argued all the time, in pre-petition litigation, that middle

piece of their process, isn't a very -- first of all, isn't subject to common issue treatment under Rule 42, because of the individualized and particularized nature of property damage claims. That's what they always argued.

There's no Court that ever held a Rule 42 common issue trial, pre-petition, in respect to property damage claims. Particularly in those cases where they argued against it, and it's for that very reason. There's just too much that's implicated by each and every one of these claims.

We view the process of estimation of property damage claims as being really very, very simple, believe it or not.

As we point out in our papers, the first thing you have to do, remarkably similar to what we've heard in other contexts today, is determine the universe of the PD claims. We've done it. We're done with that. Proofs of claims were filed. We know it.

The second is to determine whether those claims are subject to valid defenses. And then the third is to approximate the value of those claims that are conceivably allowable, after confirmation, by the trust.

We believe that the determination of their defenses is where we have the most complex part of this process. And, Judge, if you visualize this process, I think it's easy to recognize that there is only one counter-party to the process that can provide all the answers that we -- you would need to

have answered, or you would need to have, in order to come to any conclusions about what claims are likely to be allowed and what claims are not likely to be allowed, at the end of the day. And that's the property damage claimants.

We don't view the property damage committee as the appropriate proxy in respect to that. We'll lose every time.

How do I argue when the -- what action that claimant would have brought, what the statute of limitations would be in respect of that, what the nature of the product was that was installed, how ubiquitous that product was in the building, how many other installations of other products that they have in the building, whether or not there was contamination, when it occurred? I mean, Judge, it just goes on and on. The types of determinations.

And so, where we have this major difference of opinion is the involvement of property damage claims. And we don't believe that their process of excluding them from that part of the process is appropriate, either under principles of due process, or to get to an estimation.

And we don't believe that a lawyer can stand up and tell Your Honor what defenses are going to get blown away in the course of the administration of those claims, post-confirmation. That -- that's not in the purview of a lawyer to argue.

Now, as for the determination of the value of the

claims, we have argued and proposed that we really don't have the right data before us to make those -- that determination. The ultimate determination that you want to make here is, how much.

And the reason we don't, we complained about the form, and we set forth in our papers the colloquy I had with you, Judge, when you were approving this proof of claim form for property damage, and I told you, Judge, one of the biggest problems with what they're proposing is it doesn't advance estimation. It just doesn't advance it.

There's one basic question that's missing. How much asbestos do you have in the building? They don't ask it.

Of course, they reply, well, why didn't you bring it up at the time? Well, I put forward the colloquy that took place between you and I. I did bring it up at the time.

And then they say, it doesn't matter, because, you know, we asked for supporting documents and we anticipate -- we anticipated that the supporting documents would include surveys, asbestos removal surveys, and things like that, which would include the square footage. Well, what if it doesn't? And guess what? Some of it doesn't.

And we say that there's a data point that you have to have. You have to have it. And that is, you need to know how much property damage there is out there.

They asked, on the other hand, how big is the

building? That's not a proxy for anything in product -- property damage. You might have a two million square foot building, and you might have two square feet of asbestos, or you may have five million square feet of asbestos, in that two million square foot building, because of the way it's applied, because of the nature of the product.

And so we said, we've got to make that data point. And there's only one way to make that data point.

I'm not arguing for a claims by claims allowance process, Judge. I'm arguing that the claimants have got to be involved in this process. How do we -- how do we make that determination, unless there is discovery, at the very least, discovery of the claims?

And we said, that data point the Court needs. We said, as well, that there's a second data point that you need.

Now, given that you don't know what cause of action these people could have, or would have brought, given that you don't know whether in -- whether remediation is required now, given that you don't know what incidental expenses may have been incurred in the course of remediation, given all that, we do have to create some data as to how you value a property damage claim. It seems fundamental to me.

And so, we proposed that we create the data point, for the remediation. And what we said was the place to start -- the place to start that analysis is with their own records,

because we haven't heard anything about bogus, fraudulent, junk claims having been filed, pre-petition, by property damage claimants. We haven't heard about junk lawsuits. We haven't heard about junk settlements. We haven't heard any of that about property damage.

So, the information, just as in, I believe it was Babcock and Wilcox, where the Court said, you know, let -- or Eagle-Picher, I should say -- let's start the analysis with pre-petition settlement history.

We think that that's very, very important information to have. We're not saying it's the exclusive place to start the analysis, or to end the analysis. There are other things out there that we can look at too, like cost models that we used in other cases.

But, you know, the debtor has got to create this settlement database. We can't. We don't have that information. And we've said the first place to start this process if for them to develop -- that database.

As for expert reports, which is the last piece of their puzzle, we say, okay fine, we'll have expert reports, but let's give ourselves enough time that we can fill in all these blanks, all this information we don't have.

They're suggesting a process, I think it was like, in three months people will file expert reports, in six months we'll go to trial.

After what I've just described to you, Judge, there's at least got to be a common understanding that even if claimants aren't directly involved, we're going to have to go to the claims. And that's not an easy job and we need time to do that.

And three months to file a report, that's ridiculous. That's absolutely ridiculous, when nobody has ever done this before and when we have no basic information to facilitate the analysis for newfound experts.

And I don't say that critically, because the process has never been done, Judge. There isn't any expert who could pass Daubert, as having a recognized model for the estimation of property damage claims. We need to create the expertise to do this process and the debtor just, you know, reminding us in every other sentence, you know, this will also facilitate settlement.

The debtor is pushing the hammer to make this a very quick process and --

THE COURT: How many property damage claims were filed?

MR. BAENA: Forty-two hundred, Your Honor.

THE COURT: And where is the debtor, in the process of filing, and the committee -- or the claimants, in the process of responding to these gatekeeping objections?

MR. BAENA: The debtor sent out about 3,000 notices

of intent to object to the gateway objections. I don't know what their success record is on replies, but we do have set for hearing, on Monday, a motion by the property damage committee complaining about that notice.

We complained about it for a couple of reasons. First of all, you very clearly said, before they send a notice out they were to run it by us, and they never did that. And secondly, they used an omnibus notice and didn't tell anybody what was wrong with their claims, and we're going to complain about that on Monday.

So, the relief we seek, just to answer your question, is that they get it right the next time and do it over, which would put another 60 days, unless the Court believes it ought to shorten the period of time on the next notice. It's somewhere up to 60 days before that will be before the Court, or at least they can file objections.

If they file objections, as I indicated earlier, it appears that, beyond filing the objections -- by their response to our objections -- it appears that beyond filing the objections, they then want to stop that process and get into these common issue trials, and stuff like that, and then come back to the gateway objections. But, it's really ill-defined, Judge.

I'm happy to get into a room with Mr. Bernick -- I too like him a lot, I respect him an awful lot -- and see if we

can work something out, Judge.

But, the bottom line is, for something that hasn't been done before, unlike everything else that we do believe has been thoughtfully considered by the debtor, this one really got short shrift. This one just didn't get enough attention, in terms of how to proceed.

So, we think we've got to go back to the drawing board. And we're happy to help, as I indicated earlier. And if that means getting in the room, I'm happy to do that.

THE COURT: All right.

MR. BAENA: Do you want me to talk about Zonolite next, or --

THE COURT: Go ahead.

MR. BAENA: -- do you want a response to any of --

THE COURT: No. That's fine.

(Pause)

THE COURT: I don't know if it will help you, Mr. Baena, but that tray that's beneath the main ledge pulls out.

MR. BAENA: Oh. Thank you, Judge.

(Pause)

MR. BAENA: Judge, as you've already heard, in respect to Zonolite, the debtor's principal focus today is on the establishment of a bar date and the approval of a proof of claim form. That was precisely the debtor's focus in 2002 --

THE COURT: Yes, it was.

MR. BAENA: That's exactly what they told you we needed to do, and that's exactly what prompted you, after hearing enough to be at least, if not curious, concerned about taking any bold step such as this, before the science issue was vetted.

Then we spent four or five million dollars on the science issue. And now the suggestion is that this proof of claim form and this bar date have been manufactured, and engineered, and architected in such a way that it really doesn't implicate any of the concerns you had two years ago. And for the life of me, Judge, I can't imagine what the basis for those statements are.

And I will remind the Court that when we were last talking about this and decided to go the science trial route, the debtor also proposed the notice program, propounded by the same exact notice expert, Ms. Consella (phonetic), and her staff, to do the same exact thing that they intend to do here, and that is to tell people, through various media, that they need to file a proof of claim, by a bar date, or they'll lose that claim.

And we complained bitterly about that and, I think in large part, that's what resulted in the defoul of the matter, until the science issue was determined.

The -- the funny thing is, Judge, not only hasn't the reason for going forward as articulated then, and now, not

changed, all of the thinking, all of the architecting of the notice program, has not changed either. And if it has changed, it's changed for the worse.

When Consella first rolled out the last program, one of the things we complained about was, gee, you know, a lot of people don't know they have this stuff, they certainly don't know it's dangerous, and yet your program doesn't even suggest that there's danger that may be inherent. And that's how that whole conversation started.

And indeed, when we deposed Consella back in November of 2001, Consella said, you know, I didn't do anything about the science issue, because nobody's ever determined the science issue. In fact, she said, if the scientific issues had been fully litigated, and they were determinative, I would have taken that into account, in formulating my program.

But, she goes on to describe that the folks at Kirkland and Ellis told her to forget about that stuff. Don't even intimate that there may be some problem. And now we roll forward, four years, it's the same notice. The same lack of consideration or sensitivity.

And worse than that, if you take a look at the notice that they're proposing, Judge, they now have a picture of somebody holding Zonolite in their hands. They never even suggest in the headline, in the content, that this Zonolite may contain the vermiculite. They just allude to the fact that

Grace used to mine vermiculite.

They are doing everything today -- they would propose you to order them -- allow them to do today, exactly what concerned you, and more so today, back then. Nothing has changed.

THE COURT: Well, Mr. Baena, frankly, I don't think I need to hear anything on the Zonolite issue, because until I get through the science trial, I really don't think I'm prepared to address this.

I -- I think, I simply have the same concerns I had at the time. I don't know the type of notice. I don't know whether a class proof of claim is going to be appropriate.

I'm not necessarily opposed, I'll have to tell you, to a bar date, for all Zonolite claimants, before we get into the class issue, but I haven't decided that. That's something I deferred until I get through the science trial.

But, if there is an unreasonable risk of harm, I think the notice has to be much different than it does if there isn't, and I'm not going to have that notice go out until I make that decision.

So, I'm happy to hear your arguments, but I think I need to hear them later, after I get this issue decided.

MR. BAENA: Well, Judge, I -- I'm happy. I won't say another word. I'll --

(Laughter)

MR. BAENA: -- probably be making a mistake.

THE COURT: All right.

MR. BAENA: Thank you, Your Honor.

THE COURT: Okay. Anyone else wish to address either the property damage or Zonolite, before I turn back to the debtor?

Okay. Mr. Bernick?

MR. BERNICK: With respect to Zonolite, I won't address it further either, except that -- just to underscore that this is one of those areas where it's very difficult to figure out how to resolve it.

THE COURT: Yes. I understand, because the -- I understand that the nature of the claim -- claimants, the number of claimants could be huge and that the debtor has to have a determination of that issue before it can propose a plan, at least on some non-consensual basis.

That's another reason why I hope you will go back to the good offices that you started many years ago, at this point, and see if you can't get this resolved while I'm deciding the issue. Because, I still think that's the best way to try to do this.

But, I am not going to create a notice which may in -- by nature of the fact that it goes out without some alerts to danger -- cause more problems than have already been created. Conversely, if there is no danger, I don't know that

I see a need for a notice at all.

So, I think it would be a waste of the debtor's resources to go out with a notice, right now. Because, A, it may not be necessary, but B, if it is necessary, then the form of notice may have to change and the debtor may have to do it again.

MR. BERNICK: Your Honor, I understand that, and I appreciate that, and I wasn't really urging that Your Honor reconsider that, because we've been through all of this before.

I wanted, maybe somewhat opaquely and indirectly, to suggest that if we are unable to reach consensus, because we just don't know this big question of how many people are out there, it does become fairly important that we hear something from Your Honor that whenever you can get to it --

THE COURT: Mr. Bernick, you --

MR. BERNICK: -- and I say that -- I know how awful and terrible your schedule is --

THE COURT: You folks are going to be busy enough, with the discovery plans that I'm going to be giving you on the personal injury and property damage, that by the time you get done with all that, and try it if necessary, I'll have the ZAI issue determined, and then we can deal with it.

MR. BERNICK: Yes.

(Laughter)

THE COURT: And in my expectation, that gives me a

year.

MR. BERNICK: Yes.

(Laughter)

MR. BERNICK: Well, the irony is, of course, that if lighting should strike --

THE COURT: And you settle, that would be wonderful.

MR. BERNICK: No, but, no. If lightening should strike, and the ideal mix of personalities that you observed today between myself and Mr. Lockwood, actually manages to produce --

(Laughter)

MR. BERNICK: -- some kind of consensual arrangement, then the obstacle that will be left here, I don't want to say obstacle, the remaining matter to be resolved here really is the PD, at the end of the day.

And it's one that probably is, from a point of view of getting through it, far easier than the personal injury side.

THE COURT: By the time you're prepared to announce a settlement with Mr. Lockwood, if you will give me 30-days notice, I'll get a ZAI opinion out.

MR. BERNICK: Okay.

(Laughter)

MR. BERNICK: Okay. Let me talk about --

THE COURT: Are you announcing it today?

(Laughter)

MR. BERNICK: I'd like to talk a little bit about the traditional property damage claims and I want to go back, for just a moment, to the chart that I showed at the outset, which was the history here, because the history speaks pretty clearly to a point that Mr. Baena made at the end, and where we're now at in this process, which Your Honor inquired about.

The history says that this was a dying, if not fossilized area of litigation. And we then filed for Chapter 11, and people got involved, and now we have 4,000 claims which, you know, dwarfs the prior ten years of claims.

So, while we didn't make the suggestion, at least in my opening remarks, that there was a problem with bogus claims like we had in the case of personal injury, there's certainly room for a tremendous amount of suspicion about what's going on, where 4,200 claims, against the backdrop of this history where apparently none of those claims were worth enough to warrant the initiation of a lawsuit.

So, then what do we do? Well, we proposed to have this estimation process. Mr. Baena is correct, that after Your Honor determined that there was going to be a bar date, and the claim form, and after they exhausted their rights that they can appeal, and the appeal was denied, that I have no indication from Mr. Baena that he is not prepared to cooperate in the effort of moving forward here. I'm not -- didn't intend to

suggest that.

But, the essence of his remarks, therefore, has to be judged on kind of a, you know, a -- it either is or isn't kind of basis. If he says, or he believes that we really can do the estimation, it's just a question of how, then I understand that and we can all work together.

But, then the only issue for today is, you know, in a sense there is no issue for today. We ought to be able to go back and work out, more specifically, how this estimation is going to take place.

If, by contrast what he's saying is that we can't move forward, because there is some threshold obstacle and we can't do the estimation, then that is relevant for today.

So, of all the different remarks that he made, he made about eight remarks, the question is, well, are any of these show stoppers? Do any of these say we can't move forward with the estimation?

Now, he says, number one, that, gee, we're going to have experts opining as to a whole bunch of matters as to which they should not opine. It's the same issue that Mr. Lockwood raised and really misapprehends what's going on here.

The experts are not going to address or call odds on legal issues. The lawyer's going to talk about the legal issues and the experts will then translate how those legal issues link to particular claims, based upon how the lawyers

tell them the linkage works.

For example, if we were to convince Your Honor that there's something called a statue of repose, and the critical fact in the statute of repose is, when was the asbestos installed, and we were to say, Your Honor, that's what the law is, et cetera, et cetera, you buy that. The expert would then look to the claims forms to see the date of installation and would then say, okay there are the following 400 claims where there's a date of installation of, you know, 1988, 1987, 1986, including the State, and we would then have the expert be able to marry the data to what Your Honor's determined is a dispositive fact based upon the applicable law.

It's very simple. We're not talking about a lot of operative facts. If we were, we wouldn't be proposing this procedure.

So, the experts are going to stay within their purview of expertise, the lawyers are going to make the arguments, but the experts will link those arguments, based upon instructions from the lawyers, to the database. Not very complicated.

Number two, he says, well, this common issue procedure has never been done and, you know, Rule 42 doesn't eliminate all the issues in the case. We're not saying that it does.

Rule 42 is here because rule 42 enables you to

isolate particular issues. There may be dozens of individual issues, but if there are particular issues that are dispositive issues, Rule 42 is there to pick them up, if they are common, and permit the Court to rule.

As for example, take the statute of limitations. There's something called constructive notice. Constructive notice doesn't depend upon the actual facts of what an individual claimant knew, they depend upon what was reasonably ascertainable to a building owner at a given point in time. That's a common fact.

Constructive notice doesn't have to be resolved on a case by case basis.

THE COURT: But, these are the gateway issues that we were -- gatekeeping issues that we were talking about earlier. I think we can deal with those in the other -- in a different context, in separate proceedings, as you file the objections -- each gateway objection.

I don't know that that has, at this point, anything to do with the estimation hearing --

MR. BERNICK: And the two things --

THE COURT: -- because they'll be disallowed.

MR. BERNICK: Well, the two --

THE COURT: If there -- you know, if there's a ruling, as you say, that there's a statute of repose and the claim fits within it, that's what I meant, then it would be

disallowed.

MR. BERNICK: That's my point, is that in the estimation we would be picking back on whatever happens from the objection process, with respect to the gateway objections. That really is what the estimation is about.

We now have a -- it's different from personal injury. We have defined population of people, we have claim forms from every single one of those people. Your Honor can either use litigation to disallow claims, or you can use estimation, in the event that you don't want to go through every step of the process all the way through a bench trial.

Estimation works with the same evidence, but enables Your Honor to streamline the process of cutting to the chase and getting to the end of the process.

But, we're talking about the same facts. We're not talking about a whole bunch of additional facts. The gateway objections are the key objections.

Now, to the extent that you have particular cases, at the end of the line, where you don't have a gateway objection, then you are into more of an individual case by case process.

But, we want to get rid of all the other stuff that's common, be left then with the -- what we think to be a relatively modest number of claims, and then, we do get into things like, you know, square footage, et cetera, et cetera.

But, the first part of the estimation process really

works with the same issues that have been raised by the gateway objections. And they certainly can be done on a common issue basis.

The issue of Daubert, the Daubert issue here, on a dust sampling versus air sampling, is a very, very important issue. And that is a general issue. It pertains to all the claims that they're -- that rest upon that kind of data. That also can be done in the context of estimation.

So, you then get to a couple of the other objections. He says, well, I don't know that the committee can do this. This has to be done with claimant participation. First of all, if you're talking about an estimate, you don't have to have claimant participation. If the estimate is done to create an overall aggregate amount, you don't have to have claimant participation, because it's not dispositive of their particular claims.

If we want to estimate the claims for allowance purposes, the claimant has to be involved. What does that mean? Well, Mr. Baena didn't share with you, but we have 4,000 odd total claimants. Three thousand of them are represented by Mr. Speights. A hundred and fifty of them are represented by Mr. Dies.

So, the whole idea that we've got passels upon passels of claimants that are going to come streaming in, one by one, as part of the 4,000, I don't think that's right and

certainly is part of an estimation process.

If we can dispose of all but a few hundred claims, I don't think we're going to have a problem in reaching a resolution with respect to this case.

Square footage. Do we need square footage? Yes, we need square footage. Do we not have the information? Yes, we do have the information. We didn't ask for it as a question, but the documentation that was required to be supplied in the claim form includes square footage information. And we had no problem identifying the square footages, where it appears in the documentation.

Mr. Dyes, is an example in submitting his claim forms and has attached the appropriate documentation. And we can tell the square footage right off the bat.

THE COURT: When you're talking about square footage, do you mean the -- the square footage of asbestos in the building?

MR. BERNICK: Asbestos, yes.

THE COURT: Okay.

MR. BERNICK: The kind of asbestos, and the location of the asbestos, and the square footage of the asbestos.

So, at the present time, the omnibus objection process overlaps with the first part of what would be the estimation. We don't have to do any retooling. We just have to continue on this process.

And I think that the amount of work that really has to be done, as a result, to prepare these cases for an aggregate value estimation, it's very modest. And that's why we proposed a relatively tight time table.

However, we're happy to sit down and try to work out the mechanics of what the timing should be.

Question here for today is, is there some insuperable obstacle that says this can't take place? And I haven't really heard that yet. If it's there, that I think is what we should really be focusing on, because in all other areas we are well on the way to having the ability to have this estimation trial.

THE COURT: Well, the only other issue, beside the square footage that Mr. Baena argued today, had to do with the cost of remediation. And he suggested the debtor should have some sort of database, if it's done remediation, so --

MR. BERNICK: But, I think that that information is in fact available to us. We do intend to rely upon that.

THE COURT: Well --

MR. BERNICK: And the lawyers on the committee who are participating in this process, like Mr. Dies and Mr. Speights, they're the same people that we settled with for all these years. I mean, folks know what these cases have been worth in the past. I don't think that that is going to be a problem.

And to the extent that there's relevant information,

we're more than prepared to supply it.

THE COURT: All right. Well, work out something in this -- in the procedure that will provide that form of discovery without further notice. Or if there's some specific thing that Mr. Baena, or the other claimants want, that's fine.

MR. BAENA: May it please the Court. Judge, I feel constrained to just quickly respond, because all too often, when you don't, you see this in a future motion and it's characterized as not -- no response having been made by the PD.

I just want to point out that the graph that we've been suffering with, from the beginning of this case, depicts the number of lawsuits that were filed over a period of time. I presume that's -- that it's accurate. We've had no ability to test it and I don't believe Mr. Bernick is a witness.

But, it's materially different than the number of buildings in respect of which claims have been made for property damage.

THE COURT: Oh, sure.

MR. BAENA: And so when he shows you the picture, or the number of lawsuits, he doesn't show you the number of buildings.

And the 4,200 isn't some, you know, mysterious number that floated in out of thin air. There were class actions involved. It represents the number of buildings that are seeking property damage claims against this estate.

So, maybe we don't have to see the graph anymore, ever again.

(Laughter)

MR. BAENA: Now, I want to comment on the square footage issue. Mr. Bernick has so much confidence about this that I'll look forward to seeing what it is that gives him this confidence. I don't want the impression to be left though, Judge, that the proof of claim form required the claimant to set forth the amount of their contamination --

THE COURT: No, it didn't.

MR. BAENA: -- installation, or any -- it did not. It didn't require the supporting documents to have it in it, and if he's got it, it's got to be episodic, not in respect of all the claims.

THE COURT: Well, you'll know that. You can ask him to see them. I mean --

MR. BAENA: I understand.

THE COURT: -- the proofs of claim --

MR. BAENA: But, I just want to make sure we're not -- next hearing, that, well, they didn't have it, even in their supporting documents, so they don't have a proof of claim.

THE COURT: Look, you're going to build a discovery period in for this, so if you need to contact the claimants directly, to get that information, contact the claimants.

I mean, they're creditors. They're subject to the

jurisdiction of the Court. If you need them, then contact them.

MR. BAENA: Well, Judge, you know, Mr. Bernick quite rightly asked, am I raising some insuperable obstacle to the process?

THE COURT: Not for 4,200 claims. No.

MR. BAENA: I'm not. I'm not at all. But, what I'm saying is, there are limitations that are imposed on the process, if it doesn't include claimants.

And, you know, we're just a committee. Well, yes. Well, our committee members have claims. But, there are lots of buildings out there that they do not represent. And they are just as much implicated in this process. They may be bigger, who knows -- than the -- than the buildings of the people on the committee --

THE COURT: Mr. Baena, I suggest that we will handle it the same way that we handled the issue with respect to Mr. Lockwood's objection, but not because of a proof of claim matter, because in this instance, of course, we have it.

Notify everybody that an estimation hearing's going to take place, they're going to be bound by it, and if they want to participate they can.

Otherwise, I think we need lead counsel. In my view, the committee has a fiduciary obligation to represent all of the constituents of that committee. That happens to be you,

and I think you're going to be lead counsel.

So, whatever you need to get ready to prepare for this estimation hearing, if it includes information from claimants, you'll have a discovery period. Get it. Subpoena it.

And if in fact they want to participate directly, they're creditors, they can show up. And if we have 4,200 claimants in Court, then I'll need a bigger courtroom.

MR. BAENA: Okay. The last response I'd want to make, Judge, just so it doesn't leave an indelible impression, because he said it twice and it scares me when he says something twice. Daubert -- keeps coming back to what Judge Newsome did in Armstrong.

There are no claims for property damage in this case, of the sort that were implicated in the Armstrong case. That was floor tile. The asbestos was imbedded in the cementitious product that was considered to be tile. It's different.

There is no question about the fact that Monoco releases -- fiber. That's the principal product that they manufacture. It's different than floor tile, where there was a substantial question as to whether or not there was a release, and if so, under what conditions. Different Daubert decision.

Dust sample. Different reason for going after dust samples. And I just would point out, other than saying that there was a Daubert hearing in that case, on the issue, that's

the only relevance.

THE COURT: So, both of you agree that it's air sampling?

MR. BAENA: No, no, no.

THE COURT: No.

MR. BAENA: No. We don't agree on anything in that regard, Judge.

(Laughter)

MR. BAENA: I don't agree at all. What I'm saying is, what we got out of Armstrong has no instructive value in this case. It's a different kind of product. There's a difference on the science. There's a difference on the dispute about release.

THE COURT: Okay.

MR. BAENA: It has nothing to do with it.

THE COURT: I understand the point you're making. I guess my question is, in the buildings that I -- and I'm not trying to take personal experience into account, except that I need to in order to ask these questions.

For example, the Federal Building in Pittsburgh was remediated from asbestos. We were tenants in the building at the time. They used air sampling. I've never seen dust sampling. Are there in fact cases in which dust sampling has been used, as opposed to air sampling, in dealing with issues of the cost of remediation and what it takes to remediate?

MR. BAENA: I certainly can't provide the Court with that answer. I don't know that anybody in the courtroom could -- could answer that.

THE COURT: Well, let's start with that, in terms of determining what the applicable standard's going to be. And the only reason I say that I use that experience is because I saw it. So, I know it was air sampling. Other than that, I don't have any idea what they were doing, I just know that it was an air sampling test.

MR. BAENA: Well --

MR. BERNICK: Mr. Baena's clients can make their claims on the basis of air sampling, whatever the nature of the asbestos is, then there may not be a Daubert issue.

There was not just floor tile in Armstrong, there were other kinds of asbestos material including ceiling tile.

But, the issue was not the nature of the product, the issue was the scientific reliability of sampling. And we said that the air sampling was the only -- was the only recognized methodology that fit with the issue of risk and, therefore, remediation. And the other side said, no, we can rely on dust samples. And almost all their claims relied upon dust sampling data. And so a Daubert hearing was held. The dust sampling was excluded. And that was fatal to their claims.

THE COURT: Okay.

MR. BERNICK: Now, if your all's claims don't depend

upon dust sampling, then we won't have an issue.

THE COURT: All right. Well, if they do, then I guess I'm going to have to determine it in the context of this case. To the extent that the -- not only is the factual circumstance different, but the product's different, then, you know, it -- what's reliable in one circumstance, may or may not be in another. I don't know.

MR. BAENA: Yes.

THE COURT: I'm not making rulings, I was only asking --

MR. BAENA: Okay. I appreciate that.

THE COURT: -- the question. Because, if --

MR. BAENA: And I don't think the property damage claims in that case were as a result of ceiling tile. I think they were floor tile claims, predominantly.

THE COURT: Well, regardless. If in fact there is no evidence that anybody's ever used any dust sampling for this, and there may be, I really do not know, then are we going to go trudging down the dust sampling road, or are we going to use air sampling.

If we're using air sampling then I think this will probably be a much quicker tort resolution matter, because we won't have a Daubert issue.

Okay. On the property damage, then. The same order that I made with respect to the personal injury. The property

damage committee members, and the debtor, and anybody else who thinks that they're going to be presenting direct evidence in the property damage estimation hearing -- is there anyone?

No one's replying, Mr. Baena, so you and Mr. Bernick get together and work out, if you can, the terms of the case management issue, and that's -- for the estimation of the property damage, along the same lines and within the same time frame. February, if possible, March, if not, for the omnibus hearing, so that I can get to these issues and we can get a schedule going.

I want the debtor to voluntarily release whatever information the committee wants with respect to the cost of remediation -- not privileged, but relevant information to the discovery, without having to go through some sort of formal request process.

If you can work it out in this case management conference -- because I want to get this issue tried -- this one ought to be pretty simple. It shouldn't take as long, possibly, as getting your experts together on the personal injury. We need to start somewhere. We're going to start with this.

MR. BERNICK: That's terrific. With respect to -- the information, I'd like to have the opportunity to have some dialogue with Mr. Baena, so that we can figure out what it is that the committee really wants and needs, so I can at least be

more intelligent in taking that back to the client.

THE COURT: That's fine. I mean, you can do it formally, if you like. My concern is, if you --

MR. BERNICK: No, I --

THE COURT: -- really want to get it expedited --

MR. BERNICK: I --

THE COURT: -- I think this is something that can be expedited.

MR. BERNICK: Not a question of formality, I just want to make sure that Your Honor would permit us to have that dialogue, in advance, so --

THE COURT: You are always permitted to have dialogues.

(Laughter)

THE COURT: In fact you are encouraged to have dialogues.

(Laughter)

THE COURT: Preferably preceded by a martini, if that makes it helpful.

(Laughter)

THE COURT: Okay. What else with respect to the debtor's implementation and estimation issues today?

MR. BERNICK: I think that we've probably covered that waterfront and I think that -- Ms. Baer informs me that she can deal with the disclosure issues. It's a very, very

short report.

And maybe if she can make that report, Your Honor can determine whether you really want to hear anything more about that. And then, maybe we've reached an appropriate point to make haste to the airport.

THE COURT: Well, do you want to deal with the issue, or do you want to wait until Monday, of the exclusivity?

MR. BERNICK: Well, if we can hear that -- if we can, I guess, if we can hear it in a calm fashion today, we should -- do it today.

MR. FRANKEL: Your Honor, Roger Frankel, for the Futures Claim Representative, Mr. Ostern (phonetic).

In light of the rulings today, Your Honor, and the process that we're going to embark upon, we're prepared to withdraw the objection to exclusivity.

THE COURT: That was quick. Thank you, Mr. Frankel. All right.

(Laughter)

THE COURT: I will then simply -- sign the order that's been presented in the motion, extending the debtor's exclusivity period. I don't happen to have that agenda with me, so I don't know the number on the agenda right now, but I will have that order entered.

And then I think there is no need, on Monday, for any -- because I don't -- I see no benefit to getting into the plan

confirmation process, at this point.

UNIDENTIFIED MALE ATTORNEY: Right.

THE COURT: Okay. Ms. Baer?

MS. BAER: Your Honor, I think I can do it in five minutes. I can't guarantee the other side, but -- Your Honor, we submitted to you, on I think it was -- the 13th of January, a booklet of all the objections and all of the resolutions.

There were a total of 17 formal objections and two letters, the letters being the SAC and the PDGC. Both letters were resolved. All of the issues were resolved. Nine of the 17 formal objections were resolved and we have either a letter withdrawing, a formal pleading withdrawing, or an e-mail saying, the issue's resolved, they're happy with our language.

The four core confirmation issue matters got kind of interrelated with the disclosure statement. That's the PD's objection, the PI's objection, the future representative, and the Libby claimants.

The PI representative really did not, or -- and the futures representative didn't really take up any issues, per se, in other things in the disclosure statement.

The Property Damage Committee raised a number of issues to the disclosure statement, not related to confirmation issues. We believe we have addressed each and everyone of them, and we have given the Property Damage Committee all of our changes. We have asked them whether or not we've met any

of their objections. They have not responded.

I would suggest that we have always been able to work out the -- these kinds of things with them, and I'd be very happy to go through and try to see if all of the non-confirmation related matters have been met, or to add additional language to meet them. They weren't whole heartedly unreasonable and I thought we did a pretty good job of meeting their matters.

With respect to Libby, Your Honor, most of their objections did relate to core confirmation issues and I think the core confirmation issue concerns really flopped over into their disclosure objections. I'm not sure what, if anything, is left that can be resolved, or should be resolved, pending what's going to happen in terms of the plan itself.

That leaves three objections, Your Honor. Sealed Air, Maryland Casualty, and United States Trustee.

Sealed Air raised objections. Obviously, the Sealed Air contribution is a significant way in which this plan is being funded, the trusts are being funded. We made a lot of changes to the disclosure statement, the most significant of which is to state, on the record, that the debtors do not intend to object to the Sealed Air settlement agreement.

We believe that we have met the concerns that Sealed Air had and made the appropriate disclosures. We have had discussions with Sealed Air, as recently as yesterday, and this

morning. I believe that we have gone a long way, but they have identified some further issues that they have raised. We have pledged to each other to continue to talk to try to come to a resolution on all the issues.

With respect to Maryland Casualty, we have one issue left. It's very complicated only in sort of a theoretical concept. It's a simple issue with respect to worker's comp and how it fits into the injunction. I'm confident that Maryland and the debtor can work this out.

The last objection is the United States Trustee's objection. Two key matters left. Number one is releases and number two is exculpation. I believe, Your Honor, both of those are really confirmation issues.

We have made some changes to meet his objections. We have not made all of the changes. He still has problems with some of our exculpation language and some of our release language. We're happy to continue that dialogue, but again, Your Honor, we don't think it's really a disclosure objection and we can -- insert into the disclosure statement whatever appropriate language there would be to explain to everybody what the issue is, what we're doing versus what other parties believe should be done.

And, again, we're happy to continue that dialogue and try to resolve that. And if not, I truly believe that's a confirmation issue.

And that's where we are.

THE COURT: Okay. If you're still talking to everyone with whom you haven't yet resolved all of the issues, I'm wondering whether there's any benefit to try to go over objections, until I see what you actually have left.

Maybe the U.S. Trustee issues, if you're not making any further movement, and the Libby issues, if we have to get into those, if you're not making further changes.

But, it seems to me I'd rather get another draft then -- of the disclosure statement, and find out where we are, then spend time addressing things that may be moot.

MS. BAER: Your Honor, I think that makes perfect sense, unless I'm overruled here.

UNIDENTIFIED MALE ATTORNEY: No. I know better --

MR. COHEN: Your Honor, this is Daniel Cohen, for the Libby claimants.

THE COURT: Yes, sir?

MR. COHEN: There is one aspect of our objections that is a disclosure issue, not a confirmation issue, and that has to do with the history of exposure at the Libby site.

But, what I would propose is that Ms. Baer and I just work on language of a sort of -- the Libby claimants' claim and Grace claims, you know, that kind of language, since I don't think we're ever going to end up agreeing on the substance of it. But, we could certainly -- we certainly should be able to

agree on disclosure, in that form.

THE COURT: All right.

MS. BAER: Your Honor, I think that's fine.

MS. HARRISON: And Your Honor, this is Margaret Harrison, for the United States Trustee.

THE COURT: Yes?

MS. HARRISON: Appearing for Frank Perch.

THE COURT: Go ahead.

MS. HARRISON: We had one main concern, a very important concern in the disclosure statement, that concerns the opt out from the third-party releases. There's no language that says a party can vote for the plan, but opt out of the releases. And there needs to be something in the disclosure statement that allows that.

THE COURT: Ms. Harrison, I'm sorry, but you're fading out. Are you on a speaker phone?

MS. HARRISON: I'm -- I have my hand-held in my hand, but your -- your connection is really bad, where I am. It's like listening to strobe lights.

THE COURT: Ooh.

MS. HARRISON: It goes in and out.

THE COURT: Well, that's what's happening here.

MS. HARRISON: And it's -- but it's been like that all day.

THE COURT: Okay.

MS. HARRISON: So, it's been like this all day with me.

So, to the extent that we can work this out and are we anticipating getting another disclosure statement draft out? Is that what you're saying?

THE COURT: Yes. That's what I'm suggesting.

MS. HARRISON: Okay. That would work well for us, too. We need to resolve the one third-party release issue and then we'll continue to work on our other issues.

THE COURT: Okay.

MS. BAER: That's fine, Your Honor. What I would suggest is we continue to work on these unresolved issues and perhaps it makes sense to continue the approval of the disclosure statement to the next omnibus hearing. The February -- I believe it's a 28th hearing.

THE COURT: I think that's definitely going to have to be the case. I think the real problem with the approval of the disclosure statement is I'm not sure how we're getting it out until I know what the estimation numbers are anyway.

MR. BERNICK: Well --

THE COURT: Because -- why? Because --

MR. BERNICK: -- we agree.

THE COURT: Oh.

MR. BERNICK: I think that, you know, to the extent that it sounds like a tremendous amount of progress has been

made --

THE COURT: Yes.

MR. BERNICK: -- I don't think anybody believes that we're not going to have some holes in it, at the end of the day, because of what Your Honor indicated. At least we can tie down that --

THE COURT: I agree.

MR. BERNICK: -- we have a disclosure statement in all other respects, that's why we press forward and I think we'd like to just seize the fact that people are into a document, understand the document, see if we can resolve it except for the things that are going to be left blank. And if we can't then to -- get Your Honor to sign off on the balance.

THE COURT: Yes. I think that makes good sense, because that way we can let the pieces go that need to be left till the end, but everything else can be tied down.

MS. BAER: Right.

THE COURT: So, that's fine. All right. The -- anyone object to continuing the disclosure statement hearing until the February omnibus, which will give the debtor an opportunity to circulate another version of it? Okay. That's fine then. Thank you.

MS. BAER: Thank you, Your Honor.

THE COURT: Anything else, today? Anyone? Mr. Baena?

MR. BERNICK: Mr. Baena's flight's not until six o'clock our time.

(Laughter)

MR. BAENA: It's worse than that. This is actually a point of personal privilege. It's about Monday's hearing, Judge. Just the, I guess, sometime this week we found out Monday's hearing is going to be here in Pittsburgh.

THE COURT: I think -- I thought the hearing was no longer needed, Monday.

MR. BAENA: Well, there are other matters that are set for Monday and --

THE COURT: Oh.

MR. BAENA: -- we have one other motion in this case, with you. There's also the U.S. Gypsum case. And the problem is, there's a rumor that there is some sporting event --

(Laughter)

MR. BAENA: -- on Sunday night.

THE COURT: Which a certain Judge is staying in Pittsburgh to see.

(Laughter)

MR. BAENA: And apparently --

(Laughter)

MR. BAENA: And apparently 70,000 other people are coming to watch and there's no hotel rooms Sunday night, in Pittsburgh.

THE COURT: Well, I thought I provided the video conference capability from Delaware for that reason, Mr. Baena. Because, I had no way of knowing when this game was going to be scheduled.

MR. BAENA: I know you did and I was going to ask you --

THE COURT: But, I've also heard rumor --

MR. BAENA: -- in the first instance, is it going to, you know, upset you if I appear --

THE COURT: Yes.

MR. BAENA: -- in Delaware.

THE COURT: Oh, it will upset me terribly.

(Laughter)

MR. BAENA: Is that -- will --

(Laughter)

MR. BAENA: Judge, I must say that it's --

(Laughter)

MR. BAENA: It probably won't upset you as much as it would upset me to fly to Delaware to be on a TV in Pittsburgh.

(Laughter)

THE COURT: Mr. Baena, what I'm hearing, at the moment, is that they're expecting 12 inches of snow in Delaware. And it's possible that we're not going to have any hearings -- on Monday. So, I really think this has to be a flexible target.

If you can call in -- make the arrangements to dial into the system, I have no problem with anybody participating by telephone.

MR. BAENA: Including argument, Judge?

THE COURT: Yes. Including argument. Under these circumstances it, you know, it may not be possible for anybody to get either to Pittsburgh or to Delaware. I just don't know. And I would prefer to have, you know, a dial-in for everybody who's going to participate, then have you fly and get stuck somewhere. It's not fun.

MR. BAENA: Okay. And if they're going to use charts, maybe they could sent it to us --

(Laughter)

THE COURT: No charts.

MS. BAER: Your Honor, we won't have any charts. In fact, I'm looking over the agenda and there really isn't very much on it.

THE COURT: No.

MS. BAER: The most -- the only significant matter left is the matter of the -- well, is the motion to strike our notice on insufficient documentation. And then a couple miscellaneous matters.

I am planning on coming in, in person, for the hearing. If the weather doesn't cooperate, I don't think it's a major problem if people are on the telephone.

THE COURT: Okay. I really think we ought to just set up a phone call. I mean, you're welcome to be either here, or in Delaware, but I -- you know, I don't know how reliable the weather service is, but they've been talking about it for two days, so --

MS. ESKIN: We do have a dial-in set up, already.

THE COURT: Okay. So, just participate in the dial-in. My normal rule about the fact that you have to make those arrangements in advance is abrogated. So, call in. Now, go home, so you can get home.

UNIDENTIFIED FEMALE ATTORNEY: Thank you, Your Honor.

THE COURT: Okay. Thank you.

UNIDENTIFIED MALE ATTORNEY: Thank you.

UNIDENTIFIED MALE ATTORNEY: Thank you, Your Honor.

THE COURT: We're adjourned.

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C E R T I F I C A T I O N

I, MELISSA HYNES, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings, in the above-entitled matter, to the best of my ability.

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MELISSA HYNES

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